United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

614

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19073

JAMES C. LONG, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 19074

ROBREE C. EARLE, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 19075

WILLIAM E. HUFF, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Cr. No. 956-63

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
JOHN A. TERRY,
Assistant United States Attorneys.

QUESTIONS PRESENTED

1. (a) Was appellant Long denied an adequate mental examination because his commitment to Saint Elizabeths Hospital was of only thirteen days' duration rather than the customary ninety, when there is nothing in the record to show either that the Saint Elizabeths psychiatrists were restricted in their diagnosis or that appellant was hindered in the presentation of his insanity defense?

(b) Was appellant Long denied the effective assistance of counsel because his original court-appointed counsel was injured in an accident and his appointment was vacated and new counsel appointed only two months before his scheduled trial date, thereby precluding him from requesting a ninety-day commitment to Saint Elizabeths Hospital for a mental examination?

2. Was a .38 caliber pistol found at the scene of the arrest of appellants' juvenile accomplice, at the spot where the juvenile told the police he had dropped it, properly admitted into evidence?

3. Did the trial court err in excusing from the prospective jury panel in a first-degree murder case several persons who expressed reservations about capital punishment?

4. Does the record support appellants' contention that the testimony of the principal Government witness was coerced, and if so, does such alleged "coercion" render the testimony of that witness inadmissible?

5. (a) Was the evidence of appellant Huff's participation in the crime sufficient to sustain his conviction?

(b) Did the trial court improperly remove an issue from the consideration of the jury in discussing the fact that Huff was the driver of the automobile involved in the crime?

6. (a) Did the trial court commit plain error in failing to differentiate in its charge between disparate insanity defenses raised by appellant Long and appellant Earle?

(b) Did the trial court commit plain error in instructing the jury that it might consider evidence of appellants Long and Earle's prior criminal records, which appellants themselves had introduced to bolster their insanity defenses, as affecting their credibility when neither appellant ever took the stand?

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OTHER REFERENCES

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COUNTERSTATEMENT OF THE CASE

Newell W. Ellison, Jr., was shot and killed in the early morning hours of August 25, 1963, while walking his dog in the 2300 block of Kalorama Road, N.W. In a three-count indictment filed October 14, 1963, James C. Long, Robree C. Earle

and William E. Huff were jointly charged with the killing and also with robbing Ellison of a wallet containing $30. After a lengthy jury trial beginning on May 27, 1964, before Judge Tamm in the District Court, all three were found guilty of felony murder under count one and robbery under count three.[1] On October 30, 1964, each was sentenced to life imprisonment for the murder, with concurrent sentences under the robbery count of five to fifteen years for Long and Earle and three to nine years for Huff. Leave to appeal *in forma pauperis* was granted by the trial court.

Motions for mental examinations

Appellant Earle filed a motion for mental examination on November 18, 1963. The Government did not oppose the motion, and accordingly on December 6 the court ordered Earle committed to Saint Elizabeths Hospital for the ninety-day period which was customary at that time.[2] On the same day, on motion of the Government and without objection from defense counsel, the court referred appellants Long and Huff to the Legal Psychiatric Services for mental examination (E Tr. 2–4).[3] The Chief of the Legal Psychiatric Services reported to the court by letter that in his opinion, after examining Long and Huff in the courthouse cell block, both were

[1] The jury found them not guilty of premeditated murder under count two.

[2] As the Court knows, during the past year or so the normal period of commitment has been reduced to sixty days.

[3] There are numerous supplemental transcripts in the record in addition to the transcript of the trial. Five are identified by letters A through E, as follows: The hearing on appellants' motion to suppress, held at the beginning of the trial before the trial judge, begins in volume A and extends through most of volume B. The rest of volume B and all of volume C contain the voir dire examination of the jury. Volume D is a transcript of a hearing on October 2, 1964, on appellant Huff's motion for judgment of acquittal *n.o.v.* or in the alternative for a new trial. Volume E contains transcripts of three brief proceedings before Chief Judge McGuire on December 6, 1963, May 4 and May 11, 1964, relating to various motions for mental examinations. One additional volume, bearing no letter but cited herein as volume F, is a transcript of a conference in the chambers of the chief judge on the afternoon of May 11, 1964. Finally, the record also includes the transcript of the sentencing of each appellant. Thus, in chronological order, the transcripts are as follows: E, F, A, B, C, Trial Transcript (twelve volumes), D, Sentencing Transcripts. The trial transcript will be cited herein simply as "Tr."; others will be identified by letter.

mentally competent to stand trial. He further stated that he was unable to form an opinion as to "the relationship of the offense to any possible mental disease or defect," being of the view that such matters could be determined only in a psychiatric hospital with proper examining facilities. Subsequently, on February 10, 1964, appellant Long filed *pro se* a motion for mental observation, which set forth no grounds whatever except for a statement "that he is being accused for a charge that he is unware [*sic*] of the evidence are said to have taken place in the indictment." The motion was denied on February 20. Shortly thereafter, on February 28, 1964, the Acting Superintendent of Saint Elizabeths Hospital reported to the court that in the opinion of the hospital's psychiatric staff appellant Earle was mentally competent for trial and was suffering from no mental disease or defect either then or on the date of the offense.

The attorney appointed to represent appellant Long was injured in an accident and remained incapacitated for several months, unable to come to court or to engage in his law practice. Accordingly, on March 10, 1964, on the Government's motion, his appointment was vacated and new counsel appointed for Long (Tr. 1445–1446).

On April 6 all three defense counsel appeared before the chief judge in open court and agreed to the scheduling of the trial during the week of May 11, the Government objecting (E Tr. 5, F Tr. 2). On April 29, however, Long's new counsel filed a motion for mental examination, requesting commitment to Saint Elizabeths Hospital. The motion was denied on May 4 (E Tr. 6), renewed on May 11 and taken under advisement by the chief judge (E Tr. 14). That afternoon, at a hearing in the chambers of the chief judge, Long's motion was granted, as was a similar oral motion by appellant Huff (F Tr. 2–3, 6). Long and Huff were ordered sent to Saint Elizabeths for examination, with the hospital to report its findings to the court not later than May 22. Trial was specially set for May 25 (F Tr. 3). The Acting Superintendent of Saint Elizabeths informed the court in letters dated May 21 that in the opinion of the psychiatric staff of the hospital, after examination,

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neither Long nor Huff was afflicted with a mental disease or defect then or on the date of the offense and that both were mentally competent for trial.[4]

The motion to suppress

Shortly before the trial date appellant Earle moved to suppress certain evidence "obtained through illegal detention." The motion, which was also adopted by appellants Long and Huff, was set down for hearing before the trial judge. Upon representation by the prosecutor that "barring the unexpected" the Government would not offer in evidence any statements made by any of the appellants (A Tr. 12–13), the court limited the scope of the hearing to the admissibility of four specific items of evidence: a .22 caliber pistol, a .38 caliber pistol, and two bullets recovered from the body of the victim.[5] The court then heard testimony which disclosed the following facts:

About 2:45 a.m. on Sunday, September 1, 1963, Metropolitan Police Officers Clarence Albright and Herbert Emerson of No. 2 Precinct were patrolling in their scout car, headed eastward in the 1000 block of Massachusetts Avenue, N.W., when they saw a taxicab coming south on 10th Street. At the intersection of 10th and Massachusetts the taxicab went through a red light,[6] thereby attracting the officers' attention. The police car turned down 10th Street and caught up with the taxicab at 10th and K Streets, where the taxicab was stopped in the left-hand lane[7] for a red light (A Tr. 17–18, 76–78). Pulling

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[4] In addition to the foregoing, Earle and Long had been examined at the District of Columbia Jail on September 28, 1963, and again on March 9, 1964, by Dr. Albert E. Marland, a psychiatrist in private practice and a member of the Commission on Mental Health. The September examinations were made upon the informal request of Government counsel, and the March examination of Earle was made at the request of Earle's counsel. The record does not indicate who, if anyone, asked Dr. Marland to examine Long a second time (Tr. 1191–1194, 1199–1200, 1293–1294).

[5] One bullet was a .22 and the other a .38 caliber. The deputy coroner testified that either one could have been fatal, although in his opinion the .38 was probably the actual cause of death (Tr. 29–31).

[6] Officer Albright testified that the light was flashing (A Tr. 18, 25), but Officer Emerson said that it was a full red light (A Tr. 76). Either way, of course, the driver of the taxicab committed a traffic violation by failing to stop.

[7] Tenth Street is one-way southbound (A Tr. 18).

up alongside on the right, the officers observed four young men in the taxicab (A Tr. 19). Appellant Earle was driving (A Tr. 33, 79–80). Both officers noticed that the occupants appeared to be too young to be driving a cab (A Tr. 19, 35–36, 81). The four glanced over at the officers and then quickly turned their faces away, and the one seated in the right front seat, later identified as a juvenile named Robert Lee Robertson, bent forward as though to put something underneath the seat (A Tr. 20, 29, 34, 80). Officer Albright told them to pull over to the curb when the light turned green because he wanted to talk to them about the red light which they had just gone through (A Tr. 20, 29–31, 79). Just then, however, the light changed, and the taxicab zoomed around the corner onto K Street. The officers gave chase. At 6th Street and Massachusetts Avenue, N.W., the taxicab turned left into a gas station. A truck in the parking area was blocking the way, so the cab stopped, and all four occupants jumped out and began to run, leaving the rear of the taxicab sticking out into the street with three or four doors open and the motor running (A Tr. 21–22, 40, 84). The officers stopped the scout car and ran after them. Officer Albright caught up with Earle and promptly placed him under arrest (A Tr. 22), and Officer Emerson, assisted by additional officers who had come in response to a radio call, apprehended the other three—appellant Long, Robertson, and another juvenile named Kenneth Clay—in a nearby alley (A Tr. 70–72, 81–82). All four were quickly dispatched in a patrol wagon. Officer Albright then returned to the taxicab, which was still projecting into the street. The officer testified:

> I started to get into the cab to pull it all the way up into the parking lot because it was half way out on Massachusetts Avenue, and then I saw what appeared to be a gun lying on the floor, the right-hand side. I saw the grip of the gun. It was about half underneath the seat and half out. (A Tr. 40)

Officer Emerson arrived at that moment and heard his partner exclaim, " 'Holy cripes, look at this.' And I looked and he picked up a .22 caliber revolver off the floor of the passenger's side in the front seat" (A Tr. 85). The officers then returned to the precinct, Albright driving the scout car and Emerson

driving the taxicab (A Tr. 63, 74, 86, 97). The gun was later turned over to the Homicide Squad (A Tr. 24, B Tr. 155).

On Friday evening, August 30, 1963, police officers investigating the slaying had learned that an unknown person had telephoned the victim's father and stated that he had information relating to the death of his son (B Tr. 122, 170). The following day, by prearrangement with Mr. Ellison, Sr., Detectives Chrispen Preston and Jack Buch of the Homicide Squad went to the Ellison home to await the arrival of the anonymous caller. At about 4:30 p.m. a young man named George Smallwood appeared. Smallwood was a friend of Kenneth Clay and had learned the details of the crime in conversation with Clay (B Tr. 105, 120–124, 170). After discussing the situation with his girl friend and with a cousin, Smallwood had decided to get in touch with Mr. Ellison and disclose what he knew because he "didn't think it was right" (B Tr. 121–122). He told Mr. Ellison and the police [8] that five persons had gone to the 2300 block of Kalorama Road in a stolen car, held up a man on the street and shot him. Two of the five had had guns, and both had fired. All five had then fled the scene in the stolen automobile, having obtained a small amount of money from their victim (B Tr. 105–106). Smallwood identified them all by name—Earle, Long, Huff, Clay and Robertson (B Tr. 110)—and gave addresses for some of them (B Tr. 107–108). Other details in Smallwood's story were corroborated by the detectives' independent knowledge of the facts in the case.[9] As a re-

[8] At first Smallwood talked with Mr. Ellison alone while the police listened from an adjacent room through an open doorway. After about five minutes Detectives Preston and Buch entered and identified themselves (B Tr. 128, 170–171). Although he had originally cautioned Mr. Ellison not to notify the police (B Tr. 128), he acknowledged to the detectives that he had expected them to be there (B Tr. 171).

[9] Many of the details coincided with what the officers already knew—the number of persons present, the fact that two guns of different caliber were used, the angle at which one of the shots was fired, the amount of money taken from Ellison (B Tr. 107–108, 133). In addition, Smallwood admitted to Detective Preston that he had assisted in the theft of the automobile involved in the incident and later took the officer to the place where he had eventually abandoned it. The car was still there when they arrived (B Tr. 108–109, 125). In an effort to corroborate Smallwood's story still further, the police talked with other individuals and obtained from them information generally consistent with what they had already learned from Smallwood (B Tr. 109).

sult of what Smallwood told them, the police staked out the homes of Earle and Robertson at about 8:00 p.m. on Saturday, August 31 (B Tr. 109–110). It was also learned that Huff was at that time in the District of Columbia Jail (B Tr. 108).

Several hours later Detectives Moriarty, Preston and Buch were sitting in the Homicide Squad office when they heard a radio report of the pursuit of the taxicab and the apprehension of its four occupants by Officers Albright and Emerson. On a hunch Detective Moriarty called No. 2 Precinct and ascertained their names. When it was discovered that these were the same persons the Homicide Squad had been looking for, Detectives Buch and Preston immediately headed for No. 2 Precinct (B Tr. 110–111, 141–142, 176–177). Because of what Smallwood had told them, they were looking in particular for Clay (B Tr. 142). They found him in a "report writing room" at the precinct [10] with nine or ten other persons, placed him under arrest for homicide (B Tr. 143), and headed back outside to their cruiser, leaving the other three suspects at the precinct (B Tr. 143–144). As they went out the doorway and headed down the steps, Detective Preston advised Clay that he did not have to make a statement and that any statement he might make could be used against him in court (B Tr. 138, 169). As soon as they were in the cruiser and on the way to police headquarters, Clay immediately (B Tr. 139) began to confess his participation in the crime to Detective Preston.[11] By the time they had reached 4th and Eye Streets, N.W., approximately three blocks from No. 2 Precinct, en route to headquarters, Clay had admitted—

> that he was in fact involved in this case and he had stated that the Defendants Earle, Long and Huff were also involved, as well as Robertson, whom he called Little Robin. (B Tr. 112)

Later in the Homicide Squad office, while his statement was being reduced to writing, Clay said, "I might as well tell you about the other gun that I had tonight. I dropped it in the

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[10] Upon arriving at the precinct Detective Preston was met at the door by Officer Albright, who told him about the recovery of the .22 caliber pistol from the taxicab (B Tr. 111).

[11] Detective Buch was driving, and Preston and Clay were in the back seat (B Tr. 112).

alley right next to where the officers arrested me" (B Tr. 113). Lieutenant Weber of the Homicide Squad, accompanied by Officer Emerson, returned to the scene of Clay's arrest. The lieutenant testified:

> [W]e searched the area where Pvt. Emerson had placed Clay under arrest, and in the corner of a garage in the rear of 906 Fifth Street, Northwest, I recovered a .38 Smith & Wesson revolver. (B Tr. 156)

After hearing this testimony and arguments of counsel, the court denied the motion to suppress (B Tr. 222). The .22 recovered from the taxicab and the .38 found in the alley were subsequently identified as the murder weapons by an expert from the Firearms Identification Unit of the FBI [12] (Tr. 319–327). Both guns and both bullets were offered and received in evidence at the trial (Tr. 33–34, 328).

The trial

A. The Government's case

After selection of a jury the case proceeded to trial. The Government introduced evidence of the *corpus delicti,* the circumstances surrounding the shooting, and the identification of Ellison's body. A citizen testified that he found Ellison's wallet, along with a number of personal cards and papers evidently from the wallet, lying in the street a few blocks from the scene of the crime early the following morning (Tr. 83–85). He picked up the wallet and papers and turned them over to the police (Tr. 86). A fingerprint examiner from the FBI testified that he had found two latent fingerprints on one of the cards in the wallet and that in his opinion as an expert they were the prints of Robert Lee Robertson (Tr. 350–358). The wallet and the papers and cards were offered and received in evidence (Tr. 358–359).

The Government's star witness was Kenneth Clay. Before testifying, however, Clay manifested some reluctance to tell his story in open court. He was initially called to the stand on the first day of trial, out of the presence of the jury (Tr. 49).

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[12] *I.e.*, he testified that in his expert opinion the two fatal bullets had been fired from these guns.

In response to a few preliminary questions he stated that his case had been disposed of in Juvenile Court and that he had been committed to the National Training School for four years. When asked about the crime, however, he stated simply that he did not want to testify (Tr. 50–51). During the luncheon recess, with the permission of the court and in the presence of defense counsel, the prosecutor attempted to interview Clay. The interview came to a stop, however, when the conversation arrived at a point involving certain of Clay's rights and the prosecutor was unable to locate Clay's attorney. Informed of these developments, the court agreed that the attorney should be present for consultation with Clay before the prosecutor sought to elicit any testimony from him. The jury was recalled, and the trial proceeded with other witnesses (Tr. 81–84).

The following day, again outside the presence of the jury, Clay was recalled to the stand, having consulted with counsel in the meantime. Once more he declined to answer the prosecutor's questions concerning his involvement in the Ellison murder.

> [Q.] Would you tell the Court why you do not want to testify?
>
> A. Because this trial has nothing to do with me.
>
> Q. Is there any other reason?
>
> A. Sure, I have another reason, I got my time.
>
> Q. Did you not tell me yesterday that one reason was that you didn't want to see anybody go to jail?
>
> A. I don't like to see people going to jail.
>
> Q. Did you not tell me that as a reason yesterday?
>
> A. I told you that was one reason.
>
> Q. Are those the only reasons you have for not wanting to testify in this case?
>
> A. That's right. (Tr. 160–161)

Objecting to the prosecutor's suggestion that Clay was obliged to testify, Earle's counsel read to the court certain notes he had taken during the interview the previous day. Long's counsel joined in the objection, arguing that the notes showed Clay had been intimidated (Tr. 161–163). Overruling the objection, the court stated:

> I don't think intimidation would prevent a witness from testifying. It certainly would affect his credibility. I don't think the fact that a witness has been intimidated makes his testimony inadmissible per se. (Tr. 163)

After some further discussion Clay's counsel addressed the court, stating that he and his associate [13] had spoken with both Clay and Robertson and had advised them of all their rights and of their duty to tell the truth if required by the court to do so. Clay's other attorney came forward to assert on Clay's behalf his privilege against self-incrimination (Tr. 167–168). The court invited legal argument on the issue of self-incrimination. After hearing all counsel at length, the court ruled that Clay should be recalled to determine whether he himself intended to invoke the privilege (Tr. 191). He reiterated his earlier reasons for not wanting to testify (Tr. 192), whereupon both his counsel and the court advised him further about self-incrimination. Nevertheless Clay stuck to his guns, stating, "I have no reason to talk. It's none of my business" (Tr. 195). After the luncheon recess and more consultation with counsel, Clay himself asserted his privilege (Tr. 213) and the court upheld his claim (Tr. 216). Robert Lee Robertson, the next witness, also refused to answer the prosecutor's questions on the ground that his answers might incriminate him (Tr. 222–227).

With the jury still absent, Clay was again recalled to the stand, the Government contending that it had the right to insist that he invoke the privilege as to each specific question (as had been done earlier with Robertson). The prosecutor showed Clay a signed statement which he had given to the police and asked him whether everything in it was true. Clay replied, "Not everything" (Tr. 229). After a bench conference over the admissibility of the statement and a short consultation between Clay and his attorney, Clay *suddenly and without warning* began to testify fully about the offense (Tr. 232). He stated that he was with appellants on August 25, 1963, in the 2300 block of Kalorama Road; that he saw Long shoot Ellison

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[13] Two attorneys, both from the Legal Aid Agency, jointly represented both Clay and Robertson in the Juvenile Court by appointment. (Tr. 166–167).

and heard Earle's gun go off; that Ellison screamed and fell forward; that he saw Long take a wallet out of Ellison's pocket; that the $30 in the wallet was "divided," and that he received five dollars which he later threw away (Tr. 232–236). The trial then recessed overnight (Tr. 239–241).

The next morning Clay's counsel informed the court that he had again talked with his client and that Clay—

> has now indicated to me * * * that it is now his intention to testify and I am satisfied that that is his desire and his wish; and he has been fully advised as to his rights with reference to it. (Tr. 244)

Over strenuous objection by all defense counsel the court ruled that Clay would be permitted to testify before the jury, and the jury was recalled (Tr. 256–257). Clay's testimony was substantially the same as he had given the previous day with additional details. Clay stated that he had been walking on 14th Street, N.W., when he saw Long, Earle and Robertson in a car. Robertson called to him, and Clay got in the car to go for a ride (Tr. 260–262). Huff joined them somewhere on Georgia Avenue (Tr. 263) and began to drive when he got in the car (Tr. 265). It was a Saturday night, and the five young men rode around for an hour or so. Somewhere on Kalorama Road the car stopped, and Earle, Long and Robertson got out (Tr. 270). Just before they left Long said, "Don't shoot," and Earle said, "Okay" (Tr. 272). Long had a gun in his hand [14] (Tr. 271). The testimony continued:

> Q. All right. Now, describe if you would what happened after Long and Earle and Robertson got out of the automobile?
>
> A. Well, when Long got out of the car, he told the man it was a holdup.
>
> Q. Now, what man?
>
> A. Mr. Ellison.
>
> Q. Where was he?
>
> A. He was walking on the sidewalk. (Tr. 272)

[14] Long was carrying the .22 and Earle the .38 caliber revolver. Clay did not see the .38 when Earle got out of the car, but he had it in his hand when he came back (Tr. 270–271).

Long and Earle were within three feet of Ellison; Robertson was standing next to the car (Tr. 274–275).

Q. What was the next thing that happened?

* * * * *

[A.] He pulled back the hammer on the gun and then Mr. Ellison hit his hand.

Q. When you say, "he pulled back the hammer on the gun"——

A. That is Long.

Q. Long did. And how do you know that?

A. Because I could hear it.

Q. And then you said Mr. Ellison hit his hand?

A. Yes.

Q. By "his hand," whose hand do you mean?

A. Mr. Ellison hit Long's hand.

Q. Hit Long's hand. And then what happened, Kenneth?

A. The gun went off.

Q. What was the next thing that happened?

A. There was another shot.

Q. Could you estimate the time between the second shot and the first shot?

A. I know it was right after one another.

Q. What happened then, Kenneth?

A. They came back to the car first.

Q. All right. Did Long or Earle say anything when they came back to the car?

A. Long said, "I didn't shoot."

Q. Did Earle say anything at that time?

A. No, not at that time.

Q. All right. After Long said, "I didn't shoot," then what happened?

A. He went back.

Q. Back where?

A. To Mr. Ellison.

Q. And what did he do, if anything?

A. He got his money out of his pocket.

Q. Did he take anything else out of his pocket?

A. That's all.

Q. I show you Government's Exhibit No. 6 for identification and ask you if you have ever seen it or one like it with reference to the incident you are testifying about?

A. I don't remember.

Q. You don't remember?

A. I know there was a wallet tooken but I don't remember what color. (Tr. 275–277)

As they drove off, Long handed the wallet across to Robertson and told him to get rid of it. Robertson threw it out the car window (Tr. 281–282). The money that was in it, $30, was divided up.

Q. * * * How much did you get?

A. Four and some change.

Q. How much did Huff get?

A. I don't know how much he got.[15]

Q. How much did Long get?

A. I think $5.00; I'm not sure.

Q. How much did Earle get?

A. Five dollars. (Tr. 283)

At no time, by cross-examination or otherwise, did any of the three defense counsel make any attempt to elicit before the jury the circumstances under which Clay took the stand, nor did any defense counsel make the slightest suggestion to the jury in closing argument that Clay's testimony might have been the product of intimidation or coercion.

B. Defense and rebuttal

Appellants Earle and Long both raised insanity defenses which were substantially similar. Each relied on lay testimony to establish that he was a severe disciplinary problem during childhood and adolescence and committed numerous acts of very serious misbehavior. Each offered the testimony of a psychiatrist to show that he was suffering from a mental disease or defect and that the crime was its product. Earle in addition presented a psychologist who testified as to the results of cer-

[15] On cross-examination, in response to a question from Huff's counsel, Clay stated, "I don't know if he got anything" (Tr. 307).

tain psychological tests which he administered to Earle and his analysis of those results. See Tr. 393–835. The only evidence offered by appellant Huff was a stipulation that he had "joined the other defendants on the same circumstances as did the witness Kenneth Clay" (Tr. 836). None of the three appellants took the stand at any time.

In rebuttal the Government called Drs. Platkin and Owens of the psychiatric staff of Saint Elizabeths Hospital, together with Dr. Stammeyer, a staff psychologist from Saint Elizabeths. The testimony of all three was to the effect that both Earle and Long were without mental disorder of any kind. A private psychiatrist who had examined both of them in the District of Columbia Jail (see footnote 4, *supra*) testified to the same effect. Earle's former employer was also called as a witness and stated that he had never noticed anything unusual about Earle's behavior on the job (other than that he "liked to dance apparently and, occasionally, he would sort of dance a little bit," Tr. 1105) and characterized him as a normal or average employee who performed his duties in a satisfactory manner. As to Huff, of course, the Government offered no rebuttal. See Tr. 837–1430.

The trial concluded with closing arguments of counsel and the court's charge to the jury. At the conclusion of the charge only Huff's counsel registered any objection to it, specifically to that portion of it which referred to Clay as an accomplice. Long's counsel requested a further instruction regarding the jury's possible recommendation as to punishment under the first two counts. Earle's counsel had no objection to the charge as given and no request for further instructions (Tr. 1679–1681).

STATUTES INVOLVED

Title 22, § 2401, District of Columbia Code, provides in pertinent part:

> Whoever, being of sound memory and discretion, kills another purposely, either of deliberate and premeditated malice or by means of poison, or in perpetrating or attempting to perpetrate any offense punishable by imprisonment in the penitentiary, or without purpose to

> do so kills another in perpetrating or in attempting to perpetrate any * * * robbery * * * is guilty of murder in the first degree.

Title 22, § 2901, District of Columbia Code, provides:

> Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years.

SUMMARY OF ARGUMENT

Appellant Long's contention that his thirteen-day commitment to Saint Elizabeths Hospital necessarily made his mental examination "inadequate" is refuted both by the record and by a recent opinion of this Court. Only last June this Court held that there is no set period required for a mental examination. In that case, as in the case at bar, the examination did not appear to have been inadequate for any other reason. On the contrary, the record discloses that the experts at Saint Elizabeths had abundant material to assist them in evaluating Long's mental condition. If the Saint Elizabeths doctors had needed additional time or information to complete their examination, they could have and no doubt would have asked for it. After all, they are the only ones who can determine whether their examination is adequate or not, for they are the experts whose opinion is sought. If they did not find themselves hampered by lack of time or information, then surely appellant cannot disregard their judgment and contend that they were unable to arrive at a valid conclusion. Nor can appellant maintain that he was denied the effective assistance of counsel, since it is clear that the absence of counsel did not prejudice him at all in this respect.

Kenneth Clay's statement to the police after his arrest led them to the .38 caliber pistol which was later identified as one of the murder weapons and admitted into evidence. In arguing that the pistol should have been suppressed, appellants Long and Earle assert that his statement was obtained in violation

of the *Mallory* rule and that the finding and seizure of the pistol resulted from police exploitation of this primary illegality, the so-called fruit-of-the-poisonous-tree doctrine. But the *Mallory* rule does not apply to Clay because he was a juvenile at the time of his arrest. There is no requirement that juveniles be taken before magistrates or even that they be informed of their rights. Under recent holdings of this Court police questioning of a juvenile after his arrest is entirely permissible. There was thus no primary illegality to be exploited. Even if there had been, Clay would be the only person with standing to complain of it. The gun was found on the ground in a corner of a public alley. Its seizure as a result of what Clay told the police invaded no right of either Long or Earle so as to enable them to object to its admission in evidence against them.

The court did not err in excluding from the jury panel a number of persons who declared their opposition to the death penalty. Appellants of course have a right to an impartial jury. They have no right, however, to a jury which includes those who because of bias or conscientious scruple they think might favor their cause. They have thus suffered no prejudice if prospective jurors were excused by the trial court even without sufficient cause, so long as the jurors who actually heard their case were impartial. Appellants, and appellant Long in particular, have not sustained their burden of demonstrating that they were prejudiced by the trial court's action.

It is clear from the record that Kenneth Clay's ultimate decision to testify, a decision made after frequent consultation with counsel and advice from the court, was arrived at voluntarily and without coercion. Even if it had been given under duress, however, Clay's testimony would still have been admissible. The alleged coercion would have gone only to the weight to be given his testimony, not to its admissibility, and was a matter which the jury might properly have considered in assessing Clay's credibility. Appellants had ample opportunity to spread upon the record the supposedly intimidating circumstances under which Clay was testifying. They did not do so but elected instead to try to exclude him altogether as a witness. They cannot now complain because they put their eggs in the wrong basket.

The evidence of Huff's participation was clearly sufficient to sustain his conviction. It showed that Huff was the driver of the car, which subsequently became the getaway car, from the moment he joined the others some time prior to the Ellison shooting. The conversations in the car both before and after the slaying were such that anyone who heard them must have known that a crime was being planned and later that it had been completed. The jury could infer that Huff heard the conversations as readily as did Clay, who testified to what was said. The money from Ellison's wallet was divided and distributed among those present in the car, and the wallet was thrown out the window. From these facts the jury could readily infer that Huff had associated himself with the criminal enterprise sufficiently to find him guilty as an aider and abettor, even though he took no part in the actual shooting and robbery. The court's instruction on aiding and abetting was not only correct but was the only proper instruction the court could have given.

Appellant Earle assigns as plain error (unobjected to below) the failure of the trial court to differentiate between his insanity defense and that raised by Long, arguing that the jury was thereby misled into believing that it had to acquit both or neither by reason of insanity. Examination of the charge as a whole, however, discloses that the jury was carefully and explicitly instructed twice during the charge that it had to return a separate verdict as to each defendant. Moreover, it would have been unwise and might well have led to reversible error if the court had attempted to distinguish between the defenses of the two appellants, because the issue as to both of them was the same: whether the act of either was the product of a mental disease or defect. Under the circumstances appellee submits that the jury could not reasonably have been confused or misled, and accordingly there was no error in this regard.

The court did give a superfluous instruction that the jury might consider the criminal records of appellants Long and Earle in evaluating their credibility as witnesses. The instruction was inappropriate because neither appellant ever took the stand. It brought forth no objection, however, and does not

amount to plain error so as to call for reversal here. After all, it was appellants themselves who introduced all the evidence as to their own criminal records. Their purpose in doing so was to lend support to their insanity defenses. They never controverted any of the Government's proof as to the circumstances of the crime itself. Appellee submits, therefore, that having failed to give the trial court an opportunity to correct its possible error by raising timely objection, appellants cannot now come into this Court with a claim of plain error arising from this instruction.

ARGUMENT

1. Appellant Long was not denied an adequate mental examination

(E Tr. 4–15, F Tr. 1–3, 9, Tr. 740–835, 1293–1430)

Appellant Long presents a barrage of statistics and cites several non-legal authorities in support of his contention that his mental examination at Saint Elizabeths Hospital was not "adequate." His complaint appears to be essentially that the short duration of his commitment to the hospital necessarily prevented him from being properly examined. This argument must fail in light of this Court's recent opinion in *Wynder* v. *United States*, No. 18758, decided June 28, 1965.

> Appellant below urged that at least 90 days was required to make an adequate examination and now on appeal contends that some period longer than the thirty days actually afforded was necessary for a proper examination. But there is no set period required for a mental examination; and the examination does not appear to have been inadequate for any other reason. *Wynder* v. *United States, supra,* slip opinion at 2, as amended by order dated November 3, 1965.

The statute providing for pre-trial mental examinations, 24 D.C. Code § 301(a), specifies only that an accused may be committed to a mental hospital "for such reasonable period as the court may determine for examination and observation * * *." Nowhere in either statute or case law is any set period of time for such examination held to be obligatory. Appellant himself points to the testimony of Dr. Platkin, who stated on at

least two occasions (Tr. 1376, 1395–1396) that the time necessary to arrive at a meaningful diagnosis of an individual's mental condition may vary widely from case to case. The generalizations advanced by appellant must give way to the specific facts here present.

This appellant was examined at a staff conference attended by three experienced psychiatrists, a psychologist, and a social worker. The examiners had before them an admission note, a psychiatric case study prepared by yet another psychiatrist, the results of a series of psychological tests which had been administered to appellant, information from the United States Attorney's Office relating to the offense, information from another institution in which appellant had been confined, and various other data (Tr. 1368). The diagnosis of no mental disorder was based not only on the personal interview at the staff conference but on all the material and information available to the examining psychiatrists, including appellant's entire history and record, as both Drs. Platkin and Owens repeatedly stated (*e.g.*, Tr. 1370, 1375, 1411–1416). It is not unreasonable to believe that if the doctors had felt that they required additional time to complete their examinations they would have asked for it. They did not do so but made their report and testified on the basis of the examination which for them was quite sufficient.

Common sense dictates that if an expert opinion is sought only the expert can decide what amount of time and information may be necessary to arrive at that opinion. It is the psychiatrists' determination of what constitutes an adequate examination, not appellant's, that must control here. This Court acknowledged the deference which must be given to their views in this regard when it wrote in *Williams* v. *United States*, 102 U.S. App. D.C. 51, 55, 250 F. 2d 19, 23 (1957): "The examination conducted by the psychiatrists must be of a character *they* deem sufficient for the purpose of determining the facts required." (Emphasis added.) Appellant's assertion that the examination was inadequate is based largely, if not entirely, on the time factor and is apparently made without the benefit of professional qualification. In this regard appellee

commends to the Court the reasoning in *Webber* v. *Wofford-Brindley Lumber Co.*, 113 So. 2d 23, 26 (La. App. 1959):

> Insofar as defendants complain that the diagnosis was based upon a single psychiatric interview, without the aid of physical examination or other mental or medical test, *both* psychiatrists based their diagnoses upon such a psychiatric examination, which they stated without qualification to be a sufficient basis for a correct diagnosis. In the face of this uncontradicted testimony by these specialists based upon their training in this recognized branch of medicine, we like the trial court are unable to accede to the argument that a psychiatric diagnosis produced as a result of such an examination should be disregarded simply because of a supposition, unfounded upon any medical training or evidence, that such examination is insufficient for the purpose. (Footnotes omitted.)

Appellant does not and cannot show that the examination was too short or too limited in scope to enable the psychiatrists to make a proper diagnosis in the face of the psychiatrists' testimony to the contrary.

Nor can appellant complain that he was hindered in the presentation of his insanity defense. He offered both expert (Tr. 773–835) and lay testimony (Tr. 740–772) and spread his entire life history on the record in an effort to persuade the jury that his offense was the product of a mental disease or defect. The fact that the jury did not accept his defense does not permit reversal on the ground that he spent only thirteen days in Saint Elizabeths Hospital rather than ninety or only one hour at the staff conference rather than three. Here, as in *Wynder, supra,* "the examination does not appear to have been inadequate for any other reason." If it was, appellant has totally failed to demonstrate the supposed inadequacy.[16]

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[16] Appellant's position is further weakened by the fact that he affirmatively consented in open court below to the scheduling of a trial date only five weeks away and did not file his motion for a mental examination until three of those five weeks had gone by. The chief judge was fully justified under the circumstances in stating to appellant's counsel, "If you did not have time to make your investigation [of the facts in the case], certainly you should not have joined in an agreement whereby the trial date was being fixed" (E Tr. 5).

Appellant makes a related argument that he was denied the effective assistance of counsel because his original court-appointed attorney was injured in an accident and thereafter incapacitated, leaving him in effect unrepresented until March 10, 1964, when new counsel was appointed on the Government's motion. Recent decisions of this Court have emphasized that the right to counsel does not exist in a vacuum. Before a conviction can be reversed for denial of that right, the convicted defendant must show that he has suffered some prejudice as a result of the denial. *Kennedy* v. *United States,* No. 19202, decided September 9, 1965; *McGill* v. *United States,* —— U.S. App. D.C. ——, 348 F. 2d 791 (1965); see *Anderson* v. *United States,* No. 19114, decided October 28, 1965; *Williams* v. *United States,* —— U.S. App. D.C. ——, 345 F. 2d 733 (1965) (concurring opinion). The only prejudice asserted by appellant Long in this regard is the alleged inadequacy of his mental examination at Saint Elizabeths Hospital. Since, as we have seen, that examination was fully adequate, it necessarily follows that no prejudice accrued to appellant and that his right to the effective assistance of counsel was not denied.

2. The .38 caliber pistol was properly admitted into evidence

(B Tr. 110–113, 137–146, 150–151, 154–157, 168–169, 176–180)

Appellants Long and Earle contend that the .38 caliber pistol should have been suppressed because information regarding its whereabouts was given to the police by Kenneth Clay during a period of allegedly unlawful detention. They argue that since Clay was not promptly taken before a committing magistrate pursuant to Rule 5(a), F.R. Crim. P., his statement to the police was obtained in violation of the *Mallory* rule,[17] and the finding of the gun resulted from that primary illegality, necessitating the suppression of the gun itself as evidence. In appellant's view, the situation was aggravated by the fact that Clay was a juvenile at the time of his arrest.

Appellants, however, have overlooked one essential fact: Rule 5(a) does not apply to juveniles. The officers were under

[17] *Mallory* v. *United States,* 354 U.S. 449 (1957).

no obligation at any time to take Clay before a committing magistrate and indeed never did so.[18] There are—

> special practices which follow the apprehension of a juvenile. He may be held in custody by the juvenile authorities—and is available to investigating officers—for five days before any formal action need be taken. There is no duty to take him before a magistrate, and no responsibility to inform him of his rights. He is not booked. The statutory intent is to establish a non-punitive, non-criminal atmosphere. *Edwards* v. *United States*, 117 U.S. App. D.C. 383, 384, 330 F. 2d 849, 850 (1964).

See *Harling* v. *United States*, 111 U.S. App. D.C. 174, 295 F. 2d 161 (1961).[19] The police were undoubtedly well aware that under *Harling* anything Clay might tell them could not be used later in a criminal prosecution *against Clay*. There is nothing in *Harling*, however, which prevents the use of information obtained from a juvenile's statements to arresting officers in the prosecution of his adult co-defendants. Under *Edwards* and even under *Harling* the police questioning of Clay was clearly permissible. There was thus no primary illegality to be exploited, no poisonous tree to bear fruit, and it is thus unnecessary to consider whether the finding of the gun was such a fruit as to render the gun itself inadmissible. *Copeland* v. *United States*, —— U.S. App. D.C. ——, 343 F. 2d 287 (1964). Moreover, even if a primary illegality were found here, Clay would be the only one in a position to complain of it. The finding and seizure of the .38 in the alley as a result of what

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[18] Appellants Long and Earle misread the record when they state that Clay was brought before a magistrate at 10:30 a.m. on September 2, 1963 (Long brief, pp. 4–5, 22; Earle brief, pp. 3, 26). The transcript pages which they cite (B Tr. 150–151, 179–180) make no mention of Clay. The complaint in the Court of General Sessions (No. US–6987–63, filed September 2, 1963), of which this Court may take judicial notice, affirmatively shows that Long, Earle and Huff were the only persons before the court on that date.

[19] This Court stated in *Harling*:

"It is Rule 5 of the Federal Rules of Criminal Procedure which requires a preliminary hearing 'without unnecessary delay,' but those rules do not apply in juvenile proceedings. In these circumstances the question whether Rule 5, if it had been applicable, would have been violated, is an irrelevant question." *Id.* at 176, 295 F. 2d at 163.

Clay told the police invaded no right of privacy either of person or of premises which would entitle these appellants to object to its use at their trial. *Wong Sun* v. *United States*, 371 U.S. 471, 491–492 (1963).

3. There was no reversible error in the trial court's exclusion of certain prospective jurors who opposed capital punishment

(B Tr. 254–261)

In the court below it was appellant Huff (B Tr. 257, 261) who voiced objection to the court's exclusion from the jury panel of several persons who expressed either reservations or outright opposition to the death penalty. Now the ball is being carried by appellant Long (Long brief, pp. 30–32). This entire subject was thoroughly explored by this Court only a few years ago in *Turberville* v. *United States*, 112 U.S. App. D.C. 400, 407–410, 303 F. 2d 411, 418–421, *cert. denied*, 370 U.S. 946 (1962). *Turberville* and the cases cited therein, particularly *United States* v. *Puff*, 211 F. 2d 171 (2d Cir.), *cert. denied*, 347 U.S. 963 (1954), are completely dispositive of this issue. As the court observed in *Puff:*

> [A] party is entitled to an array of impartial jurors to which he may direct his peremptory challenges. To this a party is entitled as of right. But granted this, a party is entitled to no more. Having no legal right to a jury which includes those who because of scruple or bias he thinks might favor his cause, he suffers no prejudice if jurors, even without sufficient cause, are excused by the judge. 211 F. 2d at 184–185.

In the case at bar, even assuming *arguendo* that the trial court erred in striking one or two jurors from the panel, appellant is not thereby entitled to reversal so long as the jurors who actually heard his case were impartial and unbiased (and appellant of course does not suggest otherwise). The burden is on appellant to show that he was prejudiced by the trial court's action. Cf. *Ware* v. *United States*, No. 19248, decided November 3, 1965; *United States* v. *Wallace & Tiernan, Inc.*, —— U.S. App. D.C. ——, 349 F. 2d 222 (1965). He has not carried his burden. All he has done is to seize upon a suggestion offered by this

Court in *Turberville, supra* (Long brief, p. 31), asserting that the trial court did not follow it to the letter. This is not enough. Appellant has failed to demonstrate any prejudice at all and indeed cannot do so, for the jury returned its verdict with a unanimous recommendation of life imprisonment for all three appellants. Appellee submits that there can never be prejudice in such a situation. Only in a case where prospective jurors opposed to capital punishment are struck from the panel and the jury later returns a guilty verdict with a recommendation of the death penalty can a plausible claim of prejudice be made, and even then it would have to be examined in the context of each particular case. Here the entire issue is academic.

4. The testimony of Kenneth Clay was not coerced, and even if it were, it would nevertheless be admissible

(Tr. 49–53, 81–83, 159–312)

The contention made by appellants Long and Earle that Kenneth Clay's testimony was inadmissible is essentially an attack on Clay's competency as a witness. They argue that Clay was coerced into testifying, citing numerous instances of so-called "coercion," and that therefore his entire testimony was improperly received in evidence. Their position is contrary to both the applicable law and the facts in this case.

First of all, the record shows that Clay's decision to testify was his own voluntary act. It was a decision at which he arrived after a day and a half of wavering and numerous consultations with his own counsel. Appellee does not dispute that at the outset Clay may have been somewhat confused and uncertain, both as to the nature of his involvement in the proceedings and as to the effect it might have on him if he testified. It is apparent from the record, however, that by the time Clay took the stand on the second afternoon of trial (Tr. 211), having been repeatedly advised of his rights by counsel and by the court, he understood what was going on and so informed the court (Tr. 212) and invoked his privilege against self-incrimination (Tr. 213). The court upheld his claim and excused him from the courtroom (Tr. 216). It is equally apparent from the record that later the same day, after time for

reflection and further consultation with counsel (Tr. 232), Clay *changed his mind* of his own accord, without prompting from anyone, and decided to tell his story (Tr. 232–237). Even then it was not until the following morning that he was called to testify in the presence of the jury. He could readily have changed his mind again overnight and retreated once more to the protection of the Fifth Amendment. The fact remains that he did not. The record further shows (Tr. 244) that he discussed the matter with both of his attorneys during the overnight recess and told them that he was then resolved to testify. Under these circumstances, with ample opportunity for reflection, with frequent access to counsel, and with the court sustaining his earlier assertion of his Fifth Amendment privilege, appellee submits that Clay's testimony was clearly voluntary.[20]

But even had it been the product of intimidation, threats or coercion it would still have been admissible.[21] The effect of such coercion on his mental attitude and its influence, if any, on his testimony at trial would not have made that testimony incompetent. It was properly offered and received for the appraisal of the jury. *Burge* v. *United States*, 332 F. 2d 171 (8th Cir.), *cert. denied*, 379 U.S. 883 (1964); *People* v. *Portelli*, 15 N.Y. 2d 235, 205 N.E. 2d 857 (1965); see 3 WIGMORE, EVIDENCE § 815 (3d ed. 1940). Appellants had every right to bring out on cross-examination the alleged coercive circumstances

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[20] *Jackson* v. *Denno*, 378 U.S. 368 (1964), relied on heavily by both appellants, is completely beside the point. It deals not with voluntariness of testimony given by a witness in open court but with voluntariness of extrajudicial confessions made by defendants and offered into evidence at their trials. It has no application to the situation here, where no confession is involved and there is accordingly no legitimate *Jackson* v. *Denno* issue.

Moreover, if Clay had continued to claim his Fifth Amendment privilege and the court had overruled his claim and compelled him to testify, assuming *arguendo* that the court's action might have been error, appellants would have absolutely no standing to challenge the correctness of that ruling. *Bowman* v. *United States*, 350 F. 2d 913 (9th Cir. 1965), and authorities cited therein.

[21] It could be argued that every witness called into court by subpoena in a judicial proceeding testifies under coercion, in that he risks the very real threat of punishment for contempt of court if he disregards the subpoena and refuses to testify.

under which Clay was testifying. Such matters go to the weight of a witness' testimony and may legitimately be considered by the jury in assessing his credibility. Appellants, however, did not avail themselves of this opportunity and did not make any effort even to suggest to the jury that Clay might have been testifying under duress. They never once contested the truth of Clay's story, preferring instead to attempt to keep it from the jury altogether. The trial judge correctly ruled that they could not do so (Tr. 163). Clay was a competent witness, and his testimony was properly admitted. Whether it was voluntary or involuntary was a matter for the jury to consider in determining the weight to be given to it. Having elected not to bring the issue to the jury's attention, appellants have no basis for complaint here.

5. The evidence of Huff's participation in the crime was sufficient to sustain his conviction

(Tr. 258–307, 1634–1635, 1656–1658, D Tr. 1–20)

Appellant Huff's position is different from that of the other two appellants. The Government's evidence showed that Huff remained in the car with Clay while Long, Earle and Robertson perpetrated the actual robbery. The question remains whether the evidence was sufficient to convict Huff of both robbery and murder (*i.e.*, felony murder). Appellee submits that it was.

On appeal, if the evidence is asserted to be insufficient, it must be reviewed in the light most favorable to the Government, making full allowance for the right of the jury to assess the credibility of witnesses and to draw justifiable inferences of fact from the evidence adduced at trial. *Glasser* v. *United States*, 315 U.S. 60, 80 (1942); *Curley* v. *United States*, 81 U.S. App. D.C. 389, 160 F. 2d 229, *cert. denied*, 331 U.S. 837 (1947); *Morton* v. *United States*, 79 U.S. App. D.C. 329, 147 F. 2d 28, *cert. denied*, 324 U.S. 875 (1945). It is not necessary that the evidence rule out every reasonable hypothesis but that of guilt. On the contrary, where there are divergent hypotheses, one of guilt and one of innocence, and there is evidence to support either, then the jury must be given an opportunity to choose between them. *Curley* v. *United States*, *supra*.

Evaluated by these standards the evidence of Huff's guilt was decidely sufficient. It showed that Huff joined the others some time before the shooting. He began to drive immediately upon entering the car and continued driving thereafter [22] (Tr. 263–265, 268–269). When they stopped on Kalorama Road, Clay and Huff remained in the car while the other three got out, held up Ellison, shot and killed him, took his wallet from his pocket, and returned to the car, each of the three getting back in the same position as before (Tr. 270–278). As they drove off, the money from Ellison's wallet was divided, although Clay was not sure how much Huff's share was or even whether he shared at all (Tr. 283, 307). Shortly thereafter (Tr. 282–283) Long handed the empty wallet to Robertson, who threw it out the window (Tr. 281–282). From all this the jury could readily infer that Huff was a knowing participant in the crime.

In order to be convicted as an aider and abettor it is necessary that an accused in some way associate himself with the criminal venture or participate in it as in something he wishes to bring about, to seek by his action to make it succeed. *Nye & Nissen* v. *United States,* 336 U.S. 613 (1949); *United States* v. *Peoni,* 100 F. 2d 401 (2d Cir. 1938); see *Turberville* v. *United States, supra; Mays* v. *United States,* 261 F. 2d 662 (8th Cir. 1958). He need not agree to or even know all the details, minor or otherwise, of the planned crime in order to aid and abet in its commission. *Williams* v. *United States,* 308 F. 2d 664 (9th Cir. 1962). In this case there was ample evidence of Huff's knowing involvement in the criminal enterprise. From Clay's recitation of the conversation in the car the jury could infer that Huff, having heard that conversation, knew that a crime was being planned and later knew that it had been completed. The fact that he merely drove the getaway car and remained inside it while the shooting and robbery actually occurred did not diminish the degree of his participation and

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[22] Evidently appellant has abandoned the contention made below (D Tr. 7–8) that the evidence failed to show that Huff was driving the car when the offense was committed. He now states (Huff brief, p. 17) that "there is no controversy as to whether Huff was driving the automobile at the time of the alleged robbery," arguing only the issue of whether his operation of the car constituted aiding and abetting.

did not bar his conviction. See *United States* v. *Simmons*, 281 F. 2d 354, 360 (2d Cir. 1959). Moreover, his status as an aider and abettor having been established by other evidence, the mere fact that he may not have shared in the proceeds of the crime is immaterial. *Norris* v. *United States*, 152 F. 2d 808 (5th Cir.), *cert. denied*, 328 U.S. 850 (1946).

Appellant also argues (Huff brief, pp. 13–15) that the trial court "usurped the function of the jury" in its instruction to the jury relating to Huff's operation of the automobile (Tr. 1656–1658). A reading of the challenged portion of the charge fails to sustain appellant's contention. The court repeatedly told the jury that if it found certain facts to be true "you *may* find the defendant Huff as an aider and abettor of the crime," but that if it did not find him to be an aider and abettor, then "you *must* find him not guilty of all charges" (Tr. 1657–1658) (emphasis added). Clearly the court did not remove any factual issue from the consideration of the jury. Compare *Hardy* v. *United States*, 118 U.S. App. D.C. 253, 335 F. 2d 288 (1964). Appellee contends here, as it did below (D Tr. 18), that the court gave the only proper instruction it could have given. Appellee further submits that since appellant raised no objection to it below, see Rule 30, F.R. Crim. P., he is obliged to urge the point on appeal as plain error under Rule 52(b). There is no plain error here, for there is no error at all.

6. There was no reversible error in the trial court's instructions

(Tr. 1627–1681)

A. Insanity

Conceding that no objection was made below, appellant Earle nevertheless maintains (Earle brief, pp. 39–40) that the court erred in failing to differentiate between Earle and Long in instructing the jury on their insanity defenses. The basis of his argument appears to be his belief that "Long's insanity defense was meager in comparison to Earle's" and that the defenses offered by the two appellants were qualitatively dif-

ferent.[23] A fair reading of the entire charge demonstrates that Earle's contention is without merit.

It is axiomatic that the charge to the jury must be considered as a whole. *Askins* v. *United States*, 97 U.S. App. D.C. 407, 231 F. 2d 741, *cert. denied*, 351 U.S. 989 (1956); *Kinard* v. *United States*, 69 App. D.C. 322, 101 F. 2d 246 (1938). At the beginning of the charge (Tr. 1629) the court instructed the jury that it must return a separate verdict as to each defendant under each count. Later in the proceedings the court distributed among the jurors individual verdict forms, one for each appellant (Tr. 1650–1651), which would serve the incidental purpose of reminding them while deliberating that their verdict as to each under each count must be separate and distinct from the rest. From time to time during the charge the court again alluded to the jury's duty to return separate verdicts (*e.g.*, "either or both of these defendants," Tr. 1673). Clearly the jury could not have been confused in these circumstances.

The court's instructions, furthermore, fully comported with this Court's directives over the last ten or eleven years, notably in *McDonald* v. *United States*, *supra*; see, *e.g.*, *Barkley* v. *United States*, 116 U.S. App. D.C. 334, 323 F. 2d 804 (1963); *Simpson* v. *United States*, 116 U.S. App. D.C. 81, 320 F. 2d 803 (1963). Regardless of what differences there may have been in the proof offered by Long and Earle, the jury issue as to the two of them was the same: whether the act of each was the product of a mental disease or defect. This was the focus of the court's charge on insanity; had it been otherwise, and had the court attempted to evaluate or distinguish the two insanity defenses, it might well have fallen into reversible error. Earle's counsel was particularly ardent in the presentation of his defense. If he had found anything objectionable in the court's charge, surely he would have registered some objection

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[23] The differences were in degree rather than in kind. Earle offered more testimony than Long and established that he had been a more troublesome child. Beyond that, however, the only real difference was in the diagnoses offered by their respective psychiatrists. It should go without saying that such diagnostic dissimilarity is hardly enough to require the court on pain of reversal to instruct the jury separately as to each defendant. See *McDonald* v. *United States*, 114 U.S. App. D.C. 120, 312 F. 2d 847 (1962).

to it. The fact that he did not do so precludes the point from being raised here. Rule 30, F.R. Crim. P.

B. Prior criminal records

A more serious problem arises from a portion of the court's charge, quoted in full at pp. 19–20 of Earle's brief, in which the jury was instructed that it might consider the evidence that appellants had been previously convicted of other crimes as bearing on their credibility as witnesses (Tr. 1655–1656). The difficulty here lies in the fact that neither appellant ever took the stand to testify, thus making the entire instruction inappropriate. It elicited no objection below, however, from either appellant as required by Rule 30. Assuming *arguendo* the instruction was erroneous, it does not warrant reversal in the circumstances of this case.

It must be borne in mind that it was appellants themselves who brought out in minute and sordid detail their entire past records of misbehavior, including their own criminal records, in presenting their insanity defenses. Their purpose in doing so was obvious. They were striving to bolster their defenses by proving prior acts of bad conduct, prior manifestations of hostility and aggressiveness, as symptomatic of underlying mental disease. The evidence as to the criminal act itself was undisputed. Appellants' sole reliance was on the defense of insanity.[24] Earle's counsel, for example, at the beginning of his summation stated to the jury that he sought "to bring everything I possibly can before you so that you might weigh in the scales of your deliberations whether Earle is of unsound mind. *That is our only defense*" (Tr. 1505) (emphasis added). He later observed: "[O]f course, he is guilty of having shot that boy, no question about it" (Tr. 1553). Long's counsel similarly acknowledged that the testimony as to Long's partic-

[24] "Inherent in a verdict of not guilty by reason of insanity are two important elements, (a) that the defendant did in fact commit the criminal act charged, (b) that there exists some rational basis for belief that the defendant suffered from a mental disease or defect of which the criminal act is a product." *Ragsdale* v. *Overholser*, 108 U.S. App. D.C. 308, 313, 281 F. 2d 943, 948 (1960). This Court has recognized the pitfalls inherent in combining an insanity defense with a defense on the merits and the possible prejudice which may result from the combination. *Trest* v. *United States*, —— U.S. App. D.C. ——, 350 F. 2d 794 (1965); *Harper* v. *United States*, —— U.S. App. D.C. ——, 350 F. 2d 1000 (1965).

ipation in the crime was uncontroverted (Tr. 1565), directing almost his entire argument to the question of insanity. With closing arguments fresh in their minds, having sat through a three-week trial in which the principal issue of fact was the mental condition of these two appellants, the members of the jury could not possibly have been misled by this small portion of the court's charge. It may have been superfluous, but it does not necessitate reversal.

As before, appellants are obliged to invoke the plain error rule in attacking this instruction. This Court, however, has been particularly reluctant to reverse convictions for defects in instructions where there has been no objection made in the trial court. *E.g., Williams* v. *United States,* 116 U.S. App. D.C. 131, 321 F. 2d 744, *cert. denied,* 375 U.S. 898 (1963); *Wright* v. *United States,* 116 U.S. App. D.C. 60, 320 F. 2d 782 (1963). The reason behind the rule requiring timely objection is one of fundamental fairness both to the parties and to the trial judge. It gives the judge an opportunity to correct any error which may have arisen before it is too late to effect a remedy. Appellants should have complained at the proper time, before the jury retired to consider its verdict. Their dissatisfaction with the court's charge comes too late. Rule 30, F.R. Crim. P.; *Villaroman* v. *United States,* 87 U.S. App. D.C. 240, 184 F. 2d 261 (1950); see *Ruffin* v. *United States,* 106 U.S. App. D.C. 97, 269 F. 2d 544, *cert. denied,* 361 U.S. 865 (1959); *Moore* v. *United States,* 104 U.S. App. D.C. 327, 262 F. 2d 216 (1958), *cert. denied,* 359 U.S. 959 (1959); *Pitts* v. *United States,* 99 U.S. App. D.C. 63, 237 F. 2d 217 (1956); *Wyche* v. *United States,* 90 U.S. App. D.C. 67, 193 F. 2d 703 (1951), *cert. denied,* 342 U.S. 943 (1952).

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be affirmed.

DAVID G. BRESS,
United States Attorney.
FRANK Q. NEBEKER,
JOHN A. TERRY,
Assistant United States Attorneys.

U.S. GOVERNMENT PRINTING OFFICE: 1965

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

JAMES C. LONG,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

No. 19,073

PETITION FOR REHEARING EN BANC

Together with Petitioner Long, Robree C. Earle and William E. Huff's first degree murder and robbery convictions were affirmed on April 15, 1966 by a panel of this Court. James C. Long v. United States, No. 19,073. Petitioner Long, as was done at the hearing before the panel, for the convenience of the Court, adopts the arguments advanced by Petitioner Earle which are common to Long. Briefly stated, these arguments found in the Petition of Earle are as follows:

I. Evidence obtained through unlawful interrogation of a juvenile, while under exclusive jurisdiction of the Juvenile Court, must be excluded.

II. Clay's Fifth Amendment Waiver was improper.

Petitioner Long respectfully submits herein as an additional ground for rehearing en banc, the panel's treatment of Petitioner Long's contention that he was denied an adequate mental examination.

In the single paragraph of the Opinion dealing with this contention, the Court does not consider most of Petitioner's argument in this regard. In the Opinion, the Court said:

> "Long urges that his commitment to Saint Elizabeths Hospital for a mental examination was inadequate since it was for only thirteen days."
>
> * * *

While Petitioner would agree that his argument has included the fact that the length of commitment period was inadequate considering the gravity of the offense, the Court has not dealt with Petitioner's contention that a neurological examination was not administered during the commitment period. To this date, the record will reflect that no examining physician could testify as to whether or not the Petitioner was suffering from a neurological disease or defect at the time of the act complained of. If physical tests can help to determine the existence or character of illness, such tests should be made. Williams v. United States, 102 U. S. App. D. C. 51, 55-56, 250 F. 2d 19, 25-26 and cases cited therein. It suffices to submit that such a determination should be made, at very least, in cases involving capital offenses.

Petitioner has no quarrel with the Court for relying on Wynder v. United States, _____ U. S. App. D. C. _____, 352 F. 2d 662, 663 (1965), for the rule that there is no set period required for a mental examination. In Wynder, the Court was faced with the crime of robbery (D. C. Code §22-2901) and not first-degree murder. Furthermore, the defendant in Wynder received a thirty-day commitment period and not thirteen days as received by the Petitioner Long. While the Court, in Wynder did find that there is no set period required for a mental examination, they also found that the examination in that case did not appear to have been inadequate for any other reason. [P. 2 of Slip Opinion]. This latter point is the key-distinguishing feature between the instant case and Wynder, i.e., it is the contention of the Petitioner Long, as pointed out in his Brief on Appeal [Part II, pp. 38-45] that substantial evidence exists in the record to demonstrate the inadequacy of the examination.

The sitting division also held that:

> "If the psychiatrists throught more time
> was needed to make the necessary examination,
> they could have requested more time."

* * *

In the ordinary case, perhaps such surmise could be allowed, but in this case the personnel at Saint Elizabeths Hospital were examining the Petitioner Long under a Court instruction which required them to re-

port to the Court as to Long's mental condition within ten days following his arrival there.

D. C. Code, §24-301(a) provides for a commitment to determine whether a defendant was without mental disease or defect at the time of the alleged crime "for such reasonable period as the Court may determine for examination and observation". [Emphasis supplied] The Petitioner Long has no quarrel with the experts at Saint Elizabeths for not seeking additional time for the examination. Presumably, acting under the weight of a Court Order, these people do not ordinarily play the part of an advocate in seeking to extend the time within which such an examination can be accomplished. By statute, the length of examination is determined by the Court, not the examiner, and in establishing a commitment period of only thirteen days, Petitioner Long contends that the Court erred.

Petitioner finally contends that for the sitting division to conclude that, "Further, Long was not prejudiced by whatever deficiency there may have been in the examinations since he offered not only lay witnesses but also his own expert to testify that he was mentally ill", grave error has been committed.

It is respectfully submitted that prejudice is most vivid in the instant case where the jury was presented with many expert opinions founded on the inadequate mental examination of your petitioner for their

consideration of his defense of insanity.

CONCLUSION

The panel's novel interpretations of the applicable law and the broad consequences of its decision make this a proper case for rehearing en banc.

Respectfully submitted,

James R. Treese

Austin P. Frum

Court-Appointed Counsel for James C. Long
1701 K Street, N. W.
Washington, D. C. 20006

CERTIFICATE OF GOOD FAITH

I hereby certify that this Petition is presented in good faith and not for delay.

Austin P. Frum

Certificate of Service

I hereby certify that copies of the foregoing Petition for Rehearing En Banc were this 20th day of May, 1966, mailed, postage prepaid, to Frank Q. Nebeker, Esq., Assistant United States Attorney, United States Court House, Washington, D. C., Attorney for Appellee, and to Max M. Kampelman, Esq. and Daniel M. Singer, Attorneys for Appellant Earle, 1700 K Street, N. W., Washington, D. C. 20006, and to George W. Mitchell, Esq., Attorney for Appellant Huff, 2000 Ninth Street, N. W., Washington, D. C.

Austin P. Frum

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BRIEF FOR APPELLANT EARLE

UNITED STATES COURT OF APPEALS
for the District of Columbia

No. 19,074

ROBREE C. EARLE,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

Appeal from a Judgment of the
United States District Court
for the District of Columbia

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Appointed by This Court

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STATEMENT OF QUESTIONS PRESENTED

The questions are whether, in a trial of three co-defendants upon indictments for felony-murder, murder, and robbery:

1. The trial court should have excluded from evidence one of the alleged murder weapons where that weapon was discovered only through a prolonged, private, early-morning police interrogation of a juvenile accomplice following the juvenile's arrest and prior to his arraignment.

2. The trial court should have allowed the juvenile accomplice to waive his privilege against self-incrimination, especially--and in the absence of any hearing on whether the testimony was involuntary--after the trial court had upheld the assertion of that privilege, and on the basis of substantial evidence before the trial court that:

   a) coercion had been applied against the juvenile by the prosecution;

   b) the juvenile did not knowingly and voluntarily waive his privilege;

   c) the juvenile had received conflicting advice from his two court-appointed counsel concerning the nature of the privilege and whether the juvenile or his counsel should assert it; and

   d) an excludible confession obtained by the police during a period of unnecessary delay after the juvenile's ar-

rest and prior to his arraignment was improperly used by the prosecution to elicit the juvenile's testimony.

3. The trial court misled the jury in its charge on the insanity defense, by treating in agglomerate fashion the separate and qualitatively disparate insanity defenses of appellant a co-defendant.

4. The trial court erred, where evidence of prior convictions had been introduced only in support of appellant's insanity defense, in charging the jury that the fact of appellant's prior criminal record "may be given in evidence for whatever effect it has upon his credibility as a witness in the current trial" -- where in fact appellant had never been a witness in the current trial.

No. 19,074

ROBREE C. EARLE, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

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CONSTITUTION AND STATUTES

TABLE OF CASES

TREATISES AND ARTICLES

* Cases or authorities chiefly relied upon are marked by asterisks.

JURISDICTIONAL STATEMENT

Appellant Earle was convicted in District Court of murder in the first degree and, upon the jury's recommendation [Tr. 1688]*, was sentenced to life imprisonment. [S. 3] At the same trial he was also convicted of robbery and received a 5-to-15 year concurrent sentence. [Tr. 1688] The Judgment and Commitment was filed on November 2, 1964, the District Court recommending commitment to "a federal institution where the Defendant [Earle] may receive psychiatric treatment." [S. 3] The appeal was noted in the District Court docket on November 9, 1964. [R.] On November 10, 1964, the court below granted Earle leave to appeal in forma pauperis. [R.]

STATEMENT OF THE CASE

The Killing

The Government's case in chief against Earle--exclusive of the testimony of the juvenile accomplice Clay--showed that Newell Ellison, Jr., was killed in the District of Columbia on August 25, 1963 at about 1:30 A.M. by two shots, either of which alone would have been fatal. One of the shots was fired from a .38 caliber pistol; the other shot came from a .22 caliber pistol. There was also evidence that Ellison had been robbed. [Tr. 10-154; 313-334] No testimony, save that of the juvenile Clay, linked Earle to the killing or robbery.

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* The trial transcript is cited herein [Tr.___]; the motion to suppress hearing transcript, Volumes A & B, is cited herein [MS___]; the record filed in this Court is cited herein [R.___]; the transcript of the sentencing is cited herein [S.____].

The Arrests

[The following was elicted on the motion to suppress.]

Shortly after 2:45 A.M. on September 1, 1963, one week after the shooting, appellant Earle--along with his adult co-defendant Long, and the juveniles Robertson and Clay*--was arrested on a charge of unauthorized use of a motor vehicle. These arrests followed an automobile and foot chase by Metropolitan Police Department Patrolmen Albright and Emerson and other M.P.D. officers. All four suspects were taken to the Second Precinct and, not later than 3:10 A.M., were booked on the above offenses. None of the four was at that time arrested for any crime arising out of the Ellison killing.

Bulletins on the chase and apprehension were broadcast over the police radio and were heard by, among others, Detectives Preston and Buch at the Homicide Squad offices. Based on a call from Homicide Squad officers to the Second Precinct at about 3:10 A.M., the detectives determined that the four suspects already under arrest at the Second Precinct were four of the five persons being sought in the Ellison homicide. [The third adult co-defendant, Huff, was then in custody on another charge.] Detectives Preston and Buch went immediately to the Second Precinct. Upon arrival at the Second Precinct at 3:18 A.M., Detec-

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*Both Robertson and Clay had pleaded involvement in the homicide in proceedings before the Juvenile Court, and at the time of trial Clay was being held at National Training School.

tive Preston placed the juvenile Clay under arrest. [MS-16-50; 53-101; 105-113]

Clay was thereupon taken separately by Detectives Preston and Buch in a squad car from the Second Precinct to the Homicide Squad. [MS-112] The detectives testified that, prior to being placed in the police car, Clay was told that he did not have to make any statement and that any statement he made could be used against him. [MS-112; 138] Clay was not, however, informed of his right to retain counsel, his right to have a preliminary examination or any other rights accorded to him under the law. [MS-138-39; 169] Neither Clay nor the other suspects was taken before a commissioner or magistrate until approximately 10:30 A.M. on September 2, more than thirty hours after their arrest. [MS-150-151; 179-180]

During this period of detention and prior to his appearance before a committing magistrate, Clay made both written and oral statements to the police which, among other things, implicated himself and another juvenile, Robertson, as well as appellants Earle, Long and Huff, in the shooting of Newell Ellison, Jr. [MS-112-113] Several hours later, while still being questioned at homicide, Clay also told the police where to locate a .38 caliber pistol (Government's Exhibit No. 3), one of the alleged murder weapons. [MS-113; 156-157]

It was stipulated in open court by Government counsel that no arrest or search warrants had been issued against any of the defendants for the Ellison homicide [MS-135] although approximately ten hours had elapsed before the arrests and after receipt of purportedly reliable information that the five suspects had shot Ellison. The police, however, had found time enough to stake-out Earle's residence but not to get a warrant. [MS-99; 109-110]

Motion To Suppress

Prior to trial all defendants moved to suppress certain evidence obtained as a result of pre-arraignment statements made by Clay to the police, as well as to suppress Clay's oral and written statements implicating Earle, Long, and Huff. [MS. 4-5]

The circumstances surrounding Clay's arrest, detention and statements are set forth in the following excerpts from Detective Preston's testimony on the motion to suppress.

[MS-112-113]

Q After you placed him [Clay] under arrest [at 3:18 A.M.], what happened?

A I identified myself to him and placed him under arrest and told him to come with me.

While walking from the doorway of the Second Precinct to the cruiser that was parked in the driveway, I advised him of his rights. I placed him in the rear seat of the cruiser and I got into the rear seat with him, and Det. Buch drove and we started from the Second Precinct. And between the time we left the precinct and got to the intersection of 4th and Eye Streets, Northwest, approximately three blocks, to the Homicide Squad, the Defendant Clay had admitted to me that he was in fact involved in this case and he had stated that the Defendants Earle, Long and Huff were also involved, as well as Robertson, whom he called Little Robin.

Q That was prior to arriving at the Homicide Headquarters?

A This was enroute.

Q Did he mention any weapons?

A Yes, he had a 22 and a 38.

Q Did he tell you where the 38 was?

A At that time he did not.

Q Did he subsequently tell you where it was?

A Yes, sir.

Q When was that?

A After he made an oral statement to us, we then reduced that statement to typewritten form, and while taking that statement, he said, I might as well tell you about the other gun that I had tonight. I dropped it in the alley right next to where the officers arrested me.

Q What time was that?

A About 5:45 a.m.

Q That was before reducing the general statement to writing?

A That is right.

On cross-examination Detective Preston testified:
[by Mr. Vogel, Earle's trial counsel]

[MS-138] Q While the boy was in your custody, before you left Precinct No. 2 and the time you got into the cruiser, did you ask him any questions about the slaying?

. . . .

[MS-138-139] THE WITNESS:

No, sir, I did not take the time. I identified myself to him and told him he was under arrest for this homicide charge and, as we were going from the precinct, going down the steps, I advised him at that time he didn't have to make any statement to me.

BY MR. VOGEL:

Q What statement did you advise him of?

A That any statement he made to me could be used against him in Court.

Q Any other statements?

A That is it.

Q That is all?

A That is correct.

Q Then you didn't tell him--

THE COURT: The witness said that is all, Mr. Vogel. That is enough.

. . . .

[MS-142] Q When you got to No. 2, were all of the defendants gathered together there?

A I saw--I was in particular looking for Clay. I recall nine or ten persons in this report writing room. I can't say that I saw all of the defendants. I don't recall seeing them all.

. . . .

[MS-143-144] Q What was happening to the other defendants?

A To the best of my knowledge, they were still at the Second Precinct when I left.

Q Well, now, did you just go in and get Clay or did someone make a decision that you take Clay?

A No, sir, I went in and got Clay.

Q Did you give your purpose for doing this to anyone there?

A No, this was our decision; Det. Buch's and my decision.

Q Who did Det. Buch take?

A He was with Clay and I.

Q Did you tell anybody you were going to take these two? I mean that you were going to take Clay?

A Yes, Officer Albright, and there was a uniformed sergeant there and I don't recall who he was.

. . . .

[MS-145-146]

Q And is it your testimony you picked Clay up at approximately 3:10?

A 3:18.

Q 3:18? The other three, did you see them?

A I saw the defendant Earle at 4:31 a.m.

Q When did you question and when did you see Robertson?

A Approximately 4:31, also.

Q And in the interim had you gotten knowledge from Clay, or information from Clay, in regard to the gun which you have alleged he admits having?

A No, sir. That knowledge came after the confrontation at 4:27 or 4:31.

Q But did there come a time that you took Clay from the Homicide Squad?

A He was taken from the Homicide Squad to the Receiving Home.

Q All right. When did you recover the 38?

A Lt. Weber left the office a few minutes after five a.m. to recover the weapon. Clay was not returned to the scene.

And Lt. Weber of the Homicide Squad, the officer who actually recovered the .38 caliber weapon, acknowledged on cross-examination that--other than from Clay's admissions to the homicide squad after two hours of questioning following his arrest--the Police Department had no information or leads to the location of the .38 caliber pistol. [MS-157]

All of the foregoing testimony was elicted at a hearing on a motion, joined in by all appellants, to suppress, inter alia, the .38 caliber weapon. The motion to

suppress was denied as to the .38 caliber pistol [MS-222] and that weapon was introduced against Earle at trial over objection. [Tr. 328] The Court did not at that time rule on the admissibility of Clay's oral and written statement. [MS-222]

The Trial

Aside from the formal proof by the Government that an offense had been committed and the introduction of circumstantial and physical evidence of that fact, none of which directly implicated Earle, the trial proceedings below may be analyzed in three parts:

1. The "testimony" of the juvenile Clay. As the Government conceded candidly in a bench conference: "Your Honor, may I point out that my entire case or 95 per cent of my case rests on what these witnesses [Clay and the other juvenile Robertson*] will say." [Tr. 6]

2. The insanity defense and rebuttal evidence.

3. The charge to the jury.

None of the defendants testified either on the motion to suppress or at trial.

1. Clay's "Testimony"

As detailed below, after several days of courtroom wrangling and several unavailing attempts by Clay and by Clay's court-appointed counsel to plead Clay's own personal privilege against self-incrimination, the Government was permitted to wring from Clay in front of the jury testimony which directly implicated Earle and his co-defendants Long and Huff. And the lever used at trial by the U.S. Attorney to pry

*Robertson pleaded the privilege against self incrimination in a hearing outside the presence of the jury and was excused. [Tr. 217-227]

the words from Clay's mouth was the statement that Detectives Preston and Buch had pried from Clay--then a sixteen-year old youth--during the lengthy early morning detention following Clay's arrest. During Clay's detention at Homicide he was never advised of his right of counsel or of his right to a preliminary examination before a magistrate.

Clay was called as a witness for the Government on the first morning of trial, June 2, 1964, outside the presence of the jury. [Tr. 49-50] At that time Clay, then seventeen years old, was without counsel or guardian ad litem. [Tr. 81] Moreover, the record does not show any order of the Juvenile Court transferring Clay from that Court's control to the control of the prosecutor. [Tr. 173-174] Prior to his appearance at trial Clay had been held in solitary confinement at National Training School for at least six months following his plea in Juvenile Court of involvement in the Ellison homicide. NTS authorities virtually conceded that Clay was being kept in solitary confinement against their better judgment and at the direction of the prosecutors. [Tr. 246-250]

The Government's first attempt to elicit testimony from Clay aborted. As noted above, the juvenile had appeared in court uncounseled. He refused to testify, and was unable to give a clear reason for so refusing. [Tr. 49-51] Over objection the court below then allowed the Government-during the noon recess-to interview Clay, with defense counsel present-but not in front of the defendants and without an attorney or a guardian to counsel him. [Tr. 51-53; 161] Earle's trial counsel subsequently reported that interview, without objection or contradiction by the Government, as follows:

[Tr. 161-162] Mr. Vogel: . . . .

Now, I wrote down some of the questions and answers that were made by Mr. Duncan and they were as follows -- I think I have it in essence, almost verbatim:

Question by Mr. Duncan to Clay:

Didn't you tell me before that you were going to testify against them--meaning the defendants?

Answer: I don't know

Question: Why don't you tell the truth? Do you want Earle to get out and kill someone else?

Answer: I don't want anyone to kill anyone; I'm serving my time.

Question: Well, we can do it the easy way or we can do it the hard way.

Answer: No answer.

Question: I can put you on the witness stand as a hostile witness and pull it out of you.

Mr. Vogel: I object to this type of intimidation.

Mr. Mitchell to Mr. Duncan: I'll just have to get on the witness stand and testify.

That was the significant part of the testimony that I thought that the Court should know.

Now, here we have a youngster just turned 17; 16 at the time of the offense, a juvenile and I think that the evidence--the surrounding circumstances in which he gave his confession would indicate without any doubt that it was illegal and --

THE COURT: There is no question of any legality of any confession before the Court at this time. The question is whether the witness is to be compelled to testify orally or not, Mr. Vogel.

. . . .

[Tr. 163] Mr. Foshee [Counsel for defendant Long]

> Mr. Vogel has put into the record what I term a form of intimidation that took place yesterday. I would like to state my objection on the basis of intimidation.

THE COURT:

> I don't think intimidation would prevent a witness from testifying. It certainly would affect his credibility. I don't think the fact that a witness has been intimidated makes his testimony inadmissible per se.

Mr. Foshee:

> Your honor, for the record, I note my objection.

On the basis of this interview, the Government that afternoon claimed surprise at Clay's refusal to testify and requested leave to treat Clay as hostile. The court refused, and summoned Clay's Juvenile Court counsel from the Legal Aid Agency to advise Clay. [Tr. 81]

Clay was returned to the stand the following morning, with Messrs. Bellow and O'Neill, his appointed counsel, present in court. [Tr. 158] Clay again refused to answer. Earle's counsel objected to any further questioning of Clay [Tr. 159-161]

This obviously confused young man then received conflicting advice from his two attorneys. Following Clay's refusal to testify, Mr. Bellow stated:

[Tr. 168] "Your Honor, I feel as his attorney duty bound to assert in his behalf the privilege of self-incrimination which is available to him."

Mr. O'Neill, on the other hand, stated:

"I have advised Kenneth that in my opinion he should come here and tell the truth . . . ."

[Tr. 176] "I want the record clear on that point as to why I have so advised Kenneth to voluntarily testify here this morning."

After further inconclusive colloquy an attempt for the first time was made to explain to Clay in open court just what the self-incrimination privilege meant:

[Tr. 192-195]

THE COURT: Mr. Bellow, do you have any questions you want to ask this minor? The Court has appointed you to represent him.

MR. BELLOW: Your Honor, perhaps it would be well if the Court explained to the witness the legal meaning of the privilege against self-incrimination.

I have no questions to ask.

THE COURT: You may explain this privilege to the witness.

MR. BELLOW: Kenneth, as I told you before, the constitution provides that a man has a right not to be a witness against himself. That means that if he fears that something he says is going to incriminate him not anybody else, only him, that something he says is going to lead or might lead to a prosecution or an action against him, he may state, I refuse to answer on the grounds that it may incriminate me. That, as I understand it, is the privilege against self-incrimination. It is a privilege that is available to every witness, and you may assert if if you feel that something you say may incriminate you or you may be prosecuted for something.

MR. FOSHEE: Your Honor, may we approach the Bench?

THE COURT: You may.

(At the Bench:)

MR. FOSHEE: . . . It does not include that he can invoke the Fifth Amendment and not be required to say anything. That should be clearly pointed out at this point and not just the right against self-incrimination by answering, I don't wish to testify as it may incriminate me.

THE COURT: Your objection is a matter of record.

(In Open Court)

THE COURT: Do you have further questions, Mr. Duncan?

MR. DUNCAN: Not at this time, Your Honor.

THE COURT: Kenneth Jerome Clay, you have heard the attorney appointed by the Court to represent you explain to you the privilege against self-incrimination. This means that you have the right, under the Fifth Amendment to the Constitution, to decline to testify if you feel that your testimony would incriminate you in other criminal proceedings.

Is it your intention to rely upon this privilege against self-incrimination?

THE WITNESS: I don't understand what you're saying.

THE COURT: As your attorney has explained to you, you have the right to decline to testify upon the grounds that your testimony may incriminate you in this case. Do you understand that?

THE WITNESS: Yes, sir.

THE COURT: And if you desire to exercise this privilege and apply it to yourself, you have the right to decline to testify on the ground that it may incriminate you. Do you understand that?

THE WITNESS: Yes.

As the Court acknowledged after the following questioning, Clay clearly still did not understand the self-incrimination privilege.

THE COURT: And you are not declining to testify on the grounds that it may incriminate you, is that right?

[Tr. 196]

THE WITNESS: No.

THE COURT: What is right?

THE WITNESS: I just don't want nothing to do with it.

THE COURT: Then you are not claiming a privilege against incriminating yourself, is that right?

THE WITNESS: It could.

THE COURT: What?

THE WITNESS: By me testifying, it could.

THE COURT: I am going to take a further recess in this case. I would suggest, Mr. Bellow, that you in detail and with greater patience talk to this witness and attempt to explain to him the points involved in this situation.

We will take our luncheon recess now.

Mr. Bellow opened the second afternoon session by again asserting his juvenile client's Fifth Amendment privilege:

[Tr. 211] MR. BELLOW: Your Honor, I would at this time again wish to assert, on my client's behalf, his privilege against self-incrimination on the grounds he is too young, and not well-enough educated to assert the privilege.

As the Court indicated--and, as I have done--Mr. O'Neill and I spent a long period of time explaining to him as best we could, the implication of every possible action he may take on the stand, and have attempted to interpret to him the legal language in words that would be meaningful to him.

The witness has some difficulty with the word "incriminate". He understands it to mean "punish".

And, after argument by counsel, the Court sustained Clay's assertion of the privilege:

[Tr. 216] THE COURT: The Court concludes in this situation that it must sustain the exercise of the privilege against self-incrimination in behalf of this witness. The Court recognizes the witness' minority, his apparent difficulty in comprehending fully what is transpiring in the court room.

The Court is of the opinion that this witness could be prosecuted for this, or related offenses, in spite of the earlier disposition made of this witness in the Juvenile Court.

The Court consequently feels that it is required to sustain the exercise of the privilege in this case.

But despite the several assertions of the privilege by Clay's counsel, despite Clay's personal assertion of the privilege, and despite the Court 's clear ruling upon

Clay's assertion, the Court nonetheless permitted the prosecutor to continue his attack on the juvenile, using as his weapon Clay's tainted statement elicited by the homicide detectives during Clay's illegal detention. [Tr. 228-230] Earle's counsel objected:

[Tr. 230-231]

> I object to this procedure on the ground that -- based upon the Court's recognition that the boy is not able to comprehend and the fact that he already declared that he did not want to answer on the basis of self-incrimination--by his answering some of these statements--and he is not an adult, not able to know the significance of what he is doing, what is going to happen.
>
> (At the Bench.)
>
> THE COURT: I do not understand what you are trying to do, Mr. Duncan. Are you trying to supersede the Court's ruling of privilege to this witness? What are you trying to do?
>
> MR. DUNCAN: Your Honor, I am not trying to do that. It is our position that the witness must assert the privilege to those matters that he feels will incriminate him.
>
> . . . .
>
> THE COURT: You may ask direct questions in order that the witness may avail himself of the privilege.

Clay then broke and, faced with the tainted statement, proceeded to acknowledge his role as accomplice and to implicate Earle and the other defendants in the Ellison killing. [Tr. 232-237] The prosecutor then claimed Clay had waived the privilege:

[Tr. 237-240]

> Your Honor, as I understood the Court's ruling, it was that with the advice of counsel, this witness was entitled to assert his privilege against self-incrimination.
>
> I have interrogated him with respect to the material details of the shooting and of the robbery. He said that he was there, he saw one defendant shoot, he saw another defendant--he heard a second shot, that he saw the defendant Long take a wallet, that there was money in the wallet,

and that it was divided among them.

I submit, your Honor, that he has failed to assert his privilege, after meticulously being warned by counsel and by the Court. I submit to you, sir, that having failed to assert his privilege, he has waived it, and I request permission to interrogate him in front of the jury.

. . . .

MR. BELLOW: It was my position here, and Mr. O'Neill's that this boy . . . was not competent because of his age and understanding--ability to understand intricacies of asserting his privilege -- which is why I asserted. I did not assert it to each question, because it was my understanding that the original objection asserted the privilege enough to protect him.

I do not think that anything that he says or has said should or can be used against him in any proceeding or should be any evidence to be used against him in any proceeding. This has been our position and will continue to be so.

Court was then adjourned for the day. [Tr. 241]

The following morning Clay's counsel announced that Clay would testify. [Tr. 241] The Court overruled all objections of defense counsel. [Tr. 256] The Court held no hearing on whether Clay's testimony was coerced. And, despite a request from defense counsel [Tr. 250-251; 253-254] the Court refused to examine Clay further with regard to the voluntariness of Clay's waiver of his Fifth Amendment privilege or Clay's understanding of his right to remain silent.

Clay thereupon resumed the stand [Tr. 258] and, with the jury present,[Tr. 257] proceeded to give the "entire case or 95 per cent of [the] case" as the prosecution had so desperately been seeking. [Tr. 258-289]

2. The Insanity Defense

Following the admission of Clay's testimony, all that realistically remained for Earle's defense was to seek an acquittal by reason of insanity, which was in fact done with great vigor. The evidence displayed in bold relief a twenty-year old young man [Tr. 487] who had lived virtually alone with his fantasies of paranoia and violence from the time he was only a few years old. [Tr. 445-445D; 662-699; 702-720; 593-661] He was born out of wedlock and never knew his father. [Tr. 394] His mother married shortly after his birth and farmed out the infant Earle to her mother. Earle's maternal grandmother supported herself on welfare payments earned by acting as foster mother to as many as nine abandoned infants. [Tr. 399] When Earle was five years old, his natural mother was killed in a flaming automobile accident, [Tr. 396-397] and thereafter for more than a decade Earle exhibited a pattern of aberrant behavior [Tr. 397-414; 432-434] that led him in and out of various regular and special public school classes, home study programs, and psychiatric treatment. [Tr. 454-468; 479-491; 497-502; 526-563; 593]

Dr. Rickman, the only psychiatrist who had an opportunity to examine and treat Earle over a three-year period [Tr. 665] prior to the Ellison shooting, testified unequivocally that Earle was suffering from a mental disease--schizophrenia, undifferentiated type [Tr. 682]--at the time of the crime and that Earle's act was the product of that disease. [Tr. 662-699; 702-720] A clinical psychologist who had examined Earle at D.C. Jail one month prior to trial confirmed Dr. Rickman's opinion. [Tr. 593-661; 720-721]

Government psychiatrists--who had seen Earle for but a few hours in the course of his 90-day pre-trial examination at St. Elizabeths--found no mental disease or de-

fect. All maintained that, although Earle was "troublesome and undesirable" [Tr. 977] his lack of behavior controls was not so substantial as to constitute Earle, under the then prevailing standards at the hospital, a person suffering from mental disease or defect. [Tr. 841-870; 881-988]

3. The Charge

A. Earle's insanity defense was substantial in quantity and in quality. [See p. 17 , supra] Indeed, Earle's insanity defense was sufficiently impressive to move the trial court to recommend in sentencing that Earle be committed to a prison with adequate psychiatric facilities. [S.3] The trial court made no such recommendation as to the co-defendant Long [R], who also had pleaded insanity. A fair reading of the trial transcript makes clear the qualitative differences in Earle's and Long's presentations on this issue.

Despite these differences in the quality of Earle's and Long's insanity defenses, the trial court made no distinctions between their respective defenses and apparently did not attempt to distinguish the two presentations in the charge. The charge has been excerpted below to show only the confusion arising out of the Court's equivalent treatment of two quite disparate sets of circumstances* [Emphasis added]:

[Tr. 1663] In order to convict the jury must be convinced beyond a reasonable doubt either that these defendants had no mental disease or defect or that if the accused were either defective or diseased their acts were not the product of this affliction.

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* These statements are, of course, made without prejudice to any position the co-defendant and co-appellant Long may maintain concerning Long's insanity defense.

[Tr.1665] Whether the defendants had a mental disease which will excuse them from a criminal and moral responsibility for their alleged unlawful act is an issue of ultimate fact upon which you make the final finding.

. . . .

[Tr. 1665] That is the legal standard which you should apply to all the evidence, both the professional and lay, which bears upon the defendants' mental condition. Of course your concern in this regard is only as to the defendants mental condition at the time the alleged crime occurred, and whether they were on that date responsible for their actions. Although the inquiry in the decision must be as of the time of the offense, evidence of these defendants' mental condition both before and after the offense has been introduced in this trial for your consideration.

. . . .

[Tr. 1668] There has also been testimony whether if these defendants knew the nature and consequences of their acts, they were able to choose between doing or not doing the act, that is, whether through the ability to choose they were able to control their conduct in relation to the particular act in question.

. . . .

[Tr. 1669] In other words, in considering the evidence on the decisive causal relationship between the abnormal mental condition and the crime, you may consider whether the defendants possessed or lacked the capacity to distinguish right from wrong in relation to the particular acts charged in this indictment.

. . . .

[Tr. 1671] In this case in addition there has been testimony bearing upon the question of these defendants' mental condition from persons who are not experts in the field of mental health.

B. In the course of his insanity defense, Earle's criminal record was read to the jury. [Tr. 729-733] That record showed appearances before the Juvenile Court [Tr. 544-545] and misdemeanor convictions [Tr. 729-733] As noted earlier, neither Earle nor any other defendant took the stand. Nonetheless, the Court charged the jury as follows:

[Tr. 1655-1656] In the course of this trial there has been some testimony with reference to the defendants James C. Long and Robree C. Earle relating to prior arrests and convictions for other

offenses. The District of Columbia Code provides that no person shall be incompetent to testify in either civil or criminal proceedings by reason of his having been convicted of a crime, but such fact may be given in evidence to affect his credibility as a witness. The reason for this provision of our statute is again found in the common law of England. It was a rule of the common law that once a person had been convicted of a crime he could never again be a witness in any civil or criminal procedure. Ultimately it was realized that this rule of law often prevented the jury or the court from hearing the testimony perhaps of the only witness to a particular incident. Consequently the law in England and thereafter in our American states was revised to provide that a person who had been convicted of a crime is a competent witness, but the fact of his having been convicted may be given in evidence for whatever effect it has upon his credibility as a witness in the current trial.

In other words, members of the Jury, the fact that it has been established by the evidence that these defendants have been previously convicted of a crime or crimes is merely to be considered by you as to the effect such convictions may have upon their credibility in so far as it relates to their defense or defenses.

S T A T U T E S

RULE 5(a), FEDERAL RULES OF CRIMINAL PROCEDURE

Appearance before the Commissioner. An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith.

STATEMENT OF POINTS

1. It was error to admit into evidence the .38 caliber pistol which had been obtained by the police only after "sweating" its location from the juvenile accomplice during a period of unnecessary delay between arrest and arraignment.

2. Under all the circumstances, the trial court erred in allowing Clay to waive his Fifth Amendment privilege.

3. Under all the circumstances, the trial court, before allowing Clay to testify, should have held a hearing on whether that testimony had been coerced.

4. In the insanity instructions, the trial court erred in failing to distinguish between the insanity defenses of two of the defendants.

5. The trial court erred in charging the jury that it could consider appellant's prior convictions in weighing his credibility as a witness when, in fact, appellant had not testified.

SUMMARY OF ARGUMENT

1. Once again, this Court is called upon to enforce the exclusionary Mallory rule in order to upset a conviction obtained upon evidence secured from a suspect during a period of unnecessary delay between his arrest and arraignment. In this case, the violations by the police of Rule 5(a) are clear: Appellant and three of his alleged accomplices, one of whom was a juvenile, were arrested. Following the arrest the juvenile was isolated by the police without appropriate cautionary instructions, and interrogated for several hours until he told the police where one of the alleged murder weapons had been hidden. The police recovered the weapon, which was subsequently introduced at trial against Earle. The arraignment came 30 hours after the arrest. The evidence thus improperly obtained should have been excluded.

2. This Court is also here called upon to reassert the continuing integrity of the Fifth Amendment privilege against self incrimination. The juvenile Clay provided the testimony essential to convict appellant Earle. That testimony was pulled from Clay in violation of Clay's right to refuse to testify, in defiance of the assertion by Clay and by his counsel of the privilege, and in derogation of the trial court's upholding of Clay's exercise of the privilege. On the record before it, this Court cannot be satisfied that Clay's eventual waiver was properly obtained; the waiver cannot be sustained in the face of the clear failure below to establish that that waiver was uncoerced and that the consequences of the waiver were understood clearly by Clay.

3. The charge was erroneous in two major aspects: First, the effect of the

court's charge on the discrete insanity defenses of Earle and his co-defendant Long was ambiguous at best, and at worst could have been understood by the jury as a direction that the jury could only acquit both by reason of insanity or convict both. Second, the trial court, in spite of the fact that Earle did not testify, erroneously instructed the jury that the jury might consider Earle's prior convictions when passing upon Earle's credibility. Earle's conviction record was introduced only in support of Earle's insanity defense. Contrary to the court's instruction, Earle's credibility was never in issue.

ARGUMENT

1. THE DISTRICT COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS THE .38 CALIBER PISTOL.

[With respect to Point I, appellant desires the Court to read the following pages of the transcript on Motion to Suppress: MS. 6-101; 105-218]

Prior to trial, defendants jointly moved to suppress, inter alia, a .38 caliber pistol alleged to have been one of the murder weapons. After a hearing, the motion was denied. At trial, this gun was identified by the witness Clay as having been used by the appellant, Earle [Tr. 270-71], and was introduced into evidence by the Government over the continuing objection of trial counsel. [Tr. 328] The revolver became available to the police, and hence to the prosecution, only by virtue of information drawn out of Clay after his arrest and during questioning by the police in defiance of Rule 5(a), Fed. R. Crim. P. Suppression of the pistol was required. Mallory v. United States, 354 U.S. 449 (1957); Greenwell v. United States, __U.S. App. D.C.__, 336 F.2d 962 (1964); Smith v. United States, 117 U.S.

App. D.C. 1, 324 F.2d 879, 881 (1963); Ricks v. United States, 118 U.S. App. D.C. 216, 334 F.2d 964 (1964); Spriggs v. United States, 118 U.S. App. D.C. 248, 335 F.2d 283, 287 (1964); Killough v. United States, 114 U.S. App. D.C. 305, 315 F.2d 241 (1962); Tatum v. United States, 114 U.S. App. D.C. 188, 313 F.2d 579 (1962).

The evidence adduced on the motion to suppress plainly established (1) that Clay's arraignment was delayed by the police so that the police might have an opportunity to conduct a secret and uncounselled examination--an outright refusal to abide the command of Rule 5, and (2) that the information regarding the location of the .38 pistol was come at only by exploitation of this primary illegality.

(1) Unlawful Detention

The facts surrounding Clay's arrest and detention are not in dispute. Between 3:00 and 3:18 A.M. on September 1, 1963, Clay was arrested with another juvenile, Robertson, and with the appellants Earle and Long. All four were taken to Precinct No. 2 and booked for unauthorized use of an automobile.* Shortly thereafter, Homicide Squad Detectives Preston and Buch, upon discovering that the four suspects being held at Precinct No. 2 were being sought in the Ellison case, arrived at No. 2 "looking for Clay" at about 3:18 A.M.** [MS 142]

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* Clay and Long were also booked for possession of a prohibited weapon. [MS-75]

** As is discussed in the Statement, supra p. 2, Detectives Preston and Buch, along with other members of the Homicide Squad, had listened to the description of the apprehension of the four occupants of the cab over the police radio.

Preston and Buch then took only Clay from No. 2, placed him in their squad car and proceeded to their office at the Homicide Squad. According to Detective Preston's testimony, Clay admitted en route his involvement in the Ellison homicide and implicated all appellants and another juvenile. *

What transpired at the Homicide Squad is not altogether clear. The record does indicate, however, that at about 4:30 A.M., Clay was taken by the police to confront Earle with Clay's oral confession, and that Clay was later told by the police that Earle had threatened to kill him. [MS-146; Tr. 309; 311] Only after this episode, at approximately 5:45 A.M., did the police transcribe Clay's statement. [MS-113] While the statement was being typed for Clay's signature, Clay for the first time told the detectives where the .38 caliber gun was located. [MS-113; 146]

Sometime after 5:45 A.M. --in excess of two and one-half hours after Clay's arrest and only after the police had extracted Clay's confession-- Clay, as a juvenile, was taken from the Homicide Squad and delivered to the Receiving Home. [MS-146] Clay was not brought before a magistrate until 10:30 A.M. on September 2, 1963, some 30 hours after his arrest. [MS-150-151; 179-180]

On the basis of the foregoing, there can be no question that Clay's detention violated Rule 5(a). As the Supreme Court has held, and as this Court has all too often had occasion to reiterate, "The law requires an arresting officer to bring an accused before a magistrate 'as quickly as possible.' " Greenwell v. United States, __U.S. App. D.C.__, 336 F.2d 962, 965 (1964); Mallory v. United States 354 U.S. 449, 454 (1957); Naples v. United States, 113 U.S. App. D.C. 281, 284

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* Both officers also testified that Detective Preston advised Clay prior to entering the squad car of his right not to make a statement. However, Clay was not informed of his right to counsel or to preliminary examination before a Commissioner. [MS-138; 139; 169]

307 F.2d 618, 621 (1962) (en banc). See also D.C. Code §4-140 (1961). The conduct of the police, as described above, evidences the all too frequent flagrant disregard for the requirements of this Rule. There is not the slightest indication that the detectives had any intention of presenting Clay for prompt arraignment, even though U.S. Commissioners are available for such purposes at all times. Coleman v. United States, 114 U.S. App. D.C. 185, 313 F.2d 576 (1962), and cases cited therein.

Quite to the contrary, the facts bespeak a purposeful scheme designed to isolate Clay, the youngest and weakest of the suspects, and, through a secret and uncounselled interrogation, to secure from him a full confession, together with needed physical evidence. Thus, Detectives Buch and Preston, knowing that Clay had been the source relied upon by their informant [MS-105; 120], went to Precinct No. 2, as Detective Preston testified, "in particular looking for Clay."* [MS-142] Rather than proceeding directly to the U.S. Commissioner, to the juvenile authorities, or even to the D.C. Jail, the detectives took Clay to the Homicide Squad for further interrogation. As this Court has held in substantially similar circumstances, "Bringing [the arrested suspect] to a detective office at the local police headquarters for him to give a statement of the crime, instead of bringing him to a magistrate for presentment, is exactly what Mallory condemned." Greenwell v. United States, __U.S. App. D.C.__, 336 F.2d at 967.

Clay, quite obviously, was not brought to the Homicide Squad merely for the purpose of performing the mechanical task of transcribing the confession which he had

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* The officers denied any prearranged plan whereby they would arrest Clay.[MS-137] However, the fact remains that when they arrived at the station, Detective Preston acknowledged"I was in particular looking for Clay," [MS-142] and "I went in and got Clay." [MS-144]

already given, a process which could hardly consume the two and one-half hours during which he was held at the Homicide Squad. Not until Clay had been subjected to extensive questioning did the police seek to obtain a written statement. In short, there was no necessity and there can be no excuse for the flagrant violation of Rule 5(a) practiced by the police in this case.

(2) Exclusion of the Gun

Because the location of " 'the evidence to which instant objection is made has been come at only by exploitation of that [primary] illegality,' " i.e., the unlawful detention of Clay, the District Court, upon motion of defense counsel, was required to order its suppression. Wong Sun v. United States, 371 U.S. 471, 488 (1963), quoting, Maguire, Evidence of Guilt, 221 (1959). As is discussed above, the information regarding location of the .38 pistol was not obtained from Clay until after the confrontation with his alleged accomplice, long after Clay's arrest. Like the excluded physical objects in Greenwell, the "police were able to find the [gun] only because [the suspect], during a period of illegal delay, told them of the location of the evidence." Greenwell v. United States, __U.S. App. D.C. __, 336 F.2d at 967. Consistent with the rule announced in Mallory, and applied in Greenwell, the prosecution may not here be permitted to reap the harvest of its ill-gotten gains. And this Court should not demean the dignity of the judicial process and erode the Mallory rule by allowing such tainted evidence to form the basis of a criminal conviction.* See Spriggs v. United States, 118 U.S. App. D.C. 248, 335 F.2d 283, 287

* It should be noted that the record suggests that confessions were also obtained from Earle and Long during the period of unnecessary delay following their arrests. That such confessions were not introduced by the Government seems explicable only on the grounds that the Government believed those confessions clearly excludable under Mallory. [MS-12]

(1964); see Hogan & Snee, The McNabb-Mallory Rule: Its Rise, Rationale and Reason, 57 Geo. L.J. 1 (1958).

The Government may seek to renew its contention, made before the District Court in connection with the motion to suppress [MS-14-15], that despite this patent violation of Rule 5(a), the .38 pistol may not be excluded because Clay was not prosecuted. This argument is misconceived. In the first place, we find no authority requiring that the party objecting to the use against him of evidence obtained by means of unlawful detention himself have been the subject of that detention. Indeed, in a somewhat similar situation, this Court has held that a confession obtained from one defendant during a period of illegal detention could not be admitted against a co-defendant. Greenwell v. United States, __U.S. App. D.C.__, 336 F. 2d at 968. In view of the manifest purposes of the exclusionary rule--to eliminate any conviction based upon unlawful conduct by the police and thereby to uphold the Rule requiring prompt presentment--no such limitation should here be adopted. See Hogan & Snee, supra. The salutory purposes of Rule 5 would be poorly served indeed if the police were able to avoid its strictures, in the case of multiple suspects, simply by not prosecuting the one from whom evidence is secured unlawfully in order to use that evidence against his accomplices.

But even if some special interest in addition to the harm resulting from the introduction of such tainted evidence be required as a precondition to invoking the Mallory rule, such requirement is clearly satisfied by appellant. In the somewhat analogous situation of suppression of evidence obtained by means of an unlawful search and seizure, Rule 41(e) of the Federal Rules of Criminal Procedure limits the class of

parties eligible to utilize the exclusionary rule to "a person aggrieved." In United States v. Jeffers, 342 U.S. 48 (1951), the Supreme Court held this requirement to be satisfied upon a showing of a sufficient interest either in the premises searched or in the property seized. United States v. Fowler, 17 FRD 499 (S.D. Calif. 1955). Since the gun in question was identified as having been used by Earle to commit the crime, Earle would have standing to compel its suppression had the weapon been unlawfully seized from Clay. He should certainly be in no worse position because the illegality consisted of an unlawful detention of Clay.

In summary, the .38 caliber weapon should have been excluded from evidence upon motion of appellant's trial counsel. The failure of the Court to suppress this key piece of evidence was obviously prejudicial to Earle, the defendant alleged to have fired it. Consequently, on this ground alone, the case should be remanded to the District Court for the purpose of a new trial.

II. THE DISTRICT COURT ERRED IN OVERRULING APPELLANT'S OBJECTIONS TO CLAY'S TESTIMONY

[In connection with Point II, Appellant desires the Court to read the following pages: Tr. 49-53; 81-83; 158-240; 244-312]

As is detailed in the Statement, supra pp. 8-16, trial counsel objected to Clay's testimony on the grounds (1) that Clay had been coerced into testifying through a consistent pattern of threats and pressures practiced by the Government against this 17-year old juvenile, and (2) that Clay had never knowingly and voluntarily waived his Fifth Amendment privilege. The uncontradicted information known to the trial court established coercion and, as the court itself acknowledged, demonstrated an obvious lack of understanding by Clay of his right not to testify. Nonetheless, after two days

of debate, the trial court overruled defense counsel's motions and in the third morning of trial permitted Clay's testimony to go to the jury. The ultimate waiver of Clay's self-incrimination privilege was accomplished by his counsel alone. The Court made no direct inquiry of Clay to satisfy itself that Clay acted voluntarily, understood the privilege and appreciated the consequences of a waiver.

Moreover, Clay's testimony is further objectionable on the ground that it was adduced only through use by the Government of a pre-arraignment confession secured from Clay during a period of unlawful detention.

Appellant submits that, taken as a whole, these errors in the handling of this key witness, whose testimony, the Government freely conceded, constituted 95% of the prosecution's case, require that the judgment of conviction be reversed and that the case be remanded for a new trial.

A. The Fifth Amendment Issue

The Record is replete with manifest and persistent error regarding the court's handling of Clay's attempt to invoke his constitutionally-protected privilege against self-incrimination. The trial court ruled repeatedly that the Fifth Amendment privilege was available to Clay. The trial court repeatedly sustained the assertion of the privilege by Clay himself and for Clay by his counsel. And the trial court repeatedly expressed its well-founded doubts that Clay understood the privilege. Yet the trial court permitted Clay to receive the wholly contradictory advice of two different counsel and, over objection both by the defendants and by Clay's own counsel, permitted the prosecutor to avoid the Court's express ruling upholding Clay's plea of privilege. The trial court allowed the prosecutor to require the juvenile's repeated assertion of the not-understood privilege in response to questions about a subject which Clay and his counsel had already announced Clay's resolve not to discuss.

Furthermore, it must be borne in mind that Clay, throughout the entire period from his arrival at the Receiving Home in September 1, 1963 to the trial in June, 1964, was within the "exclusive jurisdiction" of the Juvenile Court. D.C. Code 11-1551(a); see also D.C. Code §§11-1551(b); 11-1584 (Supp. IV 1965). Clay was brought before the District Court without leave of the Juvenile Court and without appointment of a guardian ad litem by either Court.

Despite all of these circumstances, and the trial court's knowledge of a back-stage threat made by the U.S. Attorney against Clay--after Clay had declared his intention not to testify-- the court nonetheless made no independent inquiry into whether Clay's eventual submission to the prosecution's demands was clearly voluntary, well-understood by Clay, and concurred in by his counsel. Absent a proper record showing a judicial examination into and ruling upon the voluntariness of Clay's waiver, the trial court's acceptance of Clay's testimony was error.

The requirement of a clear and knowing waiver has often been upheld. In Smith v. United States, 337 U.S. 137, 150 (1949), Mr. Justice Reed, for a unanimous Supreme Court, explained:

> "Waiver of constitutional rights, however, is not lightly to be inferred. A witness cannot properly be held after claim to have waived his privilege . . . upon vague and uncertain evidence."

See also Nueslein v. District of Columbia, 73 App. D.C. 85, 115 F.2d 690 (1940); United States v. St. Pierre, 128 F.2d 979 (2d Cir. 1942); United States v. Bell, 81 Fed. 830, 838 (W.D. Tenn. 1897). Perhaps the most eloquent statement of the continuing vitality of the Fifth Amendment in modern times is the oft-quoted explanation of the late Mr. Justice Frankfurter in Ullmann v. United States, 350 U.S. 422, 426-428 (1956):

> "It is relevant to define explicitly the spirit in which the Fifth Amendment's privilege against self-incrimination should be approached . . . . Time has not shown that protection from the evils against which this safeguard was directed is needless or unwarranted. The constitutional protection must not be interpreted in a hostile or niggardly spirit . . . . No doubt the constitutional privilege may, on occasion, save a guilty man from his just deserts. It was aimed at a more far-reaching evil -- a recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality."

If these fundamental guarantees are to be accorded in full measure to the poor and unlettered, as well as the rich and literate, it is indispensable that a requirement of informed waiver be painstakingly enforced by compelling that the requisite understanding appear of record. It would be a most painful irony if the parties who are in greatest need of such protection are rendered least able because of ignorance to avail themselves of the privilege.

Appellant here contends that sufficient evidence existed and was known to the court which, at a minimum, created a substantial doubt that Clay understood either the meaning of the privilege or the implications of its waiver. In such circumstances, protection of this esteemed constitutional right can require no less than an independent investigation, and failing that, a judicial invocation of the privilege for the witness.* Neither course was taken in this case and a new trial is therefore required.

The Government, however, may urge upon the court that, notwithstanding the doubts surrounding the "decision" by Clay to testify, the trial court's error must stand because appellant's rights were not invaded thereby. Constitutional rights of this magnitude may not so easily be avoided. Acceptance of such a contention would,

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* Precedent for such a judicial determination can be found in the similar rule requiring that the court enter a plea of not guilty for a defendant, if at all uncertain of the latter's understanding of the implications of a guilty plea. See Rule 11, Fed. R. Crim. P.

realistically, insulate such error from appellate review in all cases where the party whose rights were invaded was a witness, rather than a defendant. In short, a witness whose invocation of the privilege was improperly compromised would be compelled to suffer the consequences of his self-incrimination without ready access to the processes of appellate review. No other remedy--necessarily in the form of subsequent collateral attack in one court on the previous proceedings in the court where the waiver was elicited--can be deemed full and adequate. No such result should here be countenanced. To preserve the vitality of the Amendment in such situations, the party against whom the testimony of the witness is introduced must be permitted to raise the validity of the waiver on appeal.

B. The Coercion Issue

The facts, all of which were before the trial court, establish a purposeful and persistent scheme by the Government to isolate Clay, bring great pressure to bear upon him, and wring from him the testimony needed to convict Earle. This pattern of coercion began with Clay's arrest for homicide and continued through the course of the trial proceedings in this case.

As has been fully described above, Clay was isolated and interrogated by the police during a period of illegal detention following his arrest. He was not then advised of his right to counsel or of his right to prompt arraignment. Subsequent to his plea before the Juvenile Court of involvement in the Ellison homicide, Clay was held for six months or more in solitary confinement at National Training School at the behest of the prosecution and against the better judgment of NTS officials. Cf. Huff v. O'Bryant, 74 App. D.C.19, 121 F.2d 890 (1941). This scheme continued even into the

halls of this court house. During a trial recess, Clay was threatened by the U.S. Attorney following Clay's first claim of the privilege.

We cannot of course blind ourselves to the fact that without Clay's testimony the Government could not have hoped to obtain a viable conviction of Earle. Neither can we be blind to the fact that--under all the circumstances here present--excessive zeal and pressure in prosecution cannot be condoned or countenanced. Nor can the majesty and dignity of our judicial process be sullied by verdicts obtained in ruthless defiance of standards developed over centuries to protect all persons from the excesses of the inquisitorial process.

Under all the circumstances, the court erred in allowing Clay to testify, over the objection of trial counsel, without an independent hearing into the coercion vel non of Clay's proferred testimony, and if found voluntary, to submit that issue to the jury only with appropriate instructions. See Wright v. United States, 102 U.S. App. D.C. 36, 250 F.2d 4, 13-14 (1957); McAffee v. United States, 70 App. D.C. 142, 105 F. 2d 21 (1939); id. 72 App. D.C. 60, 111 F.2d 199, cert. denied, 310 U.S. 643 (1940).

Jackson v. Denno, 378 U.S. 368 (1964), held, id. at 382:

> "In those cases where without the confession the evidence is insufficient, the defendant should not be convicted if the jury believes the confession but finds it may be involuntary."

The Supreme Court in Jackson was at pains to demand that the issues of voluntariness and trustworthiness of the evidence be kept distinct. See Rogers v. Richmond, 365 U.S. 534 (1961). And to assure--to the extent possible--that the distinction would be scrupulously observed, the Court in Jackson and in Rogers required a determination by the trial court prior to presenting the confession to the jury--under procedures "fully

adequate to insure a reliable and clear-cut determination of the voluntariness of the confession, including the resolution of disputed facts upon which the voluntariness issue may depend." Jackson v. Denno, 378 U.S. at 391.

It is clear that on the undisputed facts in the record -- including, inter alia, the immaturity of Clay, the report of his 6-month solitary confinement, and the prosecution's backstage threat to Clay--the issue of the voluntariness of Clay's statements was before the trial court. It is clear that Clay's testimony was crucial.* It is clear that no bearing of the type demanded by Jackson and Rogers was held. And, lastly, it is clear that the jury was misled into believing that Clay's testimony--when finally extracted after two days of dispute--was presented without a suggestion by the court that there was any question as to its voluntariness. Contrary to the facts before the court, Clay was made to appear before the jury as a repentant accomplice eager to implicate the defendants.

The court gave only the perfunctory and ritualistic instruction that Clay's testimony "should be received with care and should be scrutinized with caution." [Tr. 1654] Under the circumstances known to the Court such a charge was patently inadequate.

Furthermore, under the circumstances here presented, it would be highly inappropriate merely to remand for "an express judicial determination and finding on the issue of voluntariness," as was done in Curtis v. United States, No. 18737, decided by this Court on July 26, 1965, slip op. at 2. In Earle's case not a scintilla of evidence went to the jury on the voluntariness of Clay's confession. Nor was any instruction given to the jury in Earle's case that if they believed Clay's testimony was

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*See Gordon v. United States, 344 U.S. 414 at 417 (1953): "where, as here, the Government's case may stand or fall on the jury's belief or disbelief of one witness, his credibility is subject to close scrutiny."

involuntary the jury was free to disregard that testimony despite any prior finding of non-coercion by the trial court. And, indeed, at this late date, a hearing which would necessarily be held before a different trial judge could not reliably recreate the full sweep of the collective coercive effect on Clay which occurred during and before the trial below. The only effective remedy is a new trial. See Rogers v. Richmond, 365 U.S. at 548-49.

III. REVERSIBLE ERROR IS APPARENT ON THE FACE OF THE CHARGE

[With respect to Point III, Appellant desire the Cour to read the following pages: Tr. 1452; 1655-1656; 1663-1675]

The trial court's charge to the jury, at the end of a four week trial, contains two major errors, both of which are apparent upon mere inspection of the language used. The relevant sections of the charge are set forth in the Statement, pp. 18-20, supra.

A. Since Appellant Earle Did Not Testify, It Was Error To Charge That Earle's Criminal Record Was Relevant To His Credibility As A Witness.

Neither Earle nor any of his co-defendants testified at trial. Earle's criminal record--only of Juvenile Court involvements and misdemeanor convictions--was introduced as part of Earle's attempt to buttress further his insanity defense. Since Earle had not taken the witness stand, his "credibility as a witness" was clearly not in issue before the jury. Nonetheless, the trial court charged that Earle's prior criminal record might be considered by the jury "for whatever effect it has upon his [Earle's] credibility as a witness in the current trial." [Tr. 1656]

The error is "plain", both in the sense that the error is apparent upon a mere reading of the charge, and in the sense that such an error may be noticed on appeal under Rule 52(b), Fed. R. Crim. P., as not being "harmless".

The error may be readily observed and understood. The court in effect implied to the jury, contrary to the evidence, that Earle had testified and that Earle's prior convictions had been introduced in the traditional manner to impeach Earle's credibility as a witness.

To charge in a manner contrary to the evidence is error. As the Supreme Court held in Quercia v. United States, 289 U.S. 466 at 471 (1933):

> "In the instant case, the trial judge did not analyze the evidence; he added to it, and he based his instruction upon his own addition."

Furthermore, we believe that by now it is well-recognized that a pattern of prior criminal behavior, and incorrigibility with respect to duly-constituted authority, may furnish some evidence supportive of mental disease. For the court to have told the jury that such evidence of prior criminality might itself be considered to impeach the insanity defense simply compounded the error.

Second, the error was not harmless and should be noted on appeal here, even absent objection below. To impugn--on a clearly erroneous basis-- a substantial insanity defense in a first degree murder case cannot with requisite certitude be determined to be harmless by this Court. And it is certainly excusable that counsel below entered no objection at the time. Even if the trial court's assurance prior to charging did not lull counsel into an unwarranted sense of security, see Tr. 1452, counsel should not be required to remonstrate by interruption of the court's charge in

order to preserve such a key issue on appeal. See Surratt v. United States, 106 U.S. App. D.C. 49, 269 F.2d 240 (1959).

B. The Charge Gave The Erroneous Impression That The Jury Had To Acquit On Insanity Grounds Both Earle And A Co-Defendant Or Acquit Neither Of Them On Insanity Grounds.

Though not objected to below, the error is plain and should be noticed here. What has been said just above denying harmless error in a murder case charge applies with equal force to this aspect of the insanity charge.

As a fair reading of the record makes evident, Earle's insanity defense was substantial. He had undergone psychiatric treatment for a period of three years prior to the offense. The psychiatrist who knew most about Earle testified unequivocally that Earle was suffering from a mental disease at the time of the alleged crime and that the crime was the product of that disease. A clinical psychologist who examined Earle thoroughly at D.C. Jail confirmed the diagnosis. Government witnesses testified to the contrary, and, by any standard, the insanity issue as to Earle was a close one.

Earle's co-defendant Long also entered an insanity defense. By contrast, fairly appraised on the record--either because Long's examination was inadequate or otherwise--Long's insanity defense was meager in comparison to Earle's.

However, the jury or this Court may evaluate the psychiatric evidence, compare Wright, v. United States, 102 U.S. App. D.C. 36, 250 F. 2d 4 (1957), with McDonald v. United States, 114 U.S. App. D.C. 120, 312 F.2d 847 (1962), the record [S. 3] makes clear that the trial court believed that Earle's and Long's insanity defenses differed markedly in substance. There can be no other explanation for the trial court's decision to recommend psychiatric care for Earle and to fail to

make a similar recommendation for Long.

Under such circumstances, it was clear error for the trial court in its charge to the jury to refer repeatedly to these "defendants" in plural form and to the "defendants' mental condition" as if there were but one condition and defense presented instead of the two qualitatively quite different conditions and defenses. See Surratt v. United States, supra. In the face of such a charge the jury could fairly have believed that they had no alternative but to acquit both Earle and Long on insanity grounds, or to acquit neither. Such a belief was clearly erroneous.

CONCLUSION

It is respectfully urged that Earle's conviction must be reversed and his case remanded to the District Court with instructions to grant a new trial.

Respectfully submitted,

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September 7, 1965

REPLY BRIEF FOR APPELLANT EARLE

UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit

No. 19,074

ROBREE C. EARLE,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

Appeal from a Judgment of the
United States District Court
for the District of Columbia

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UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit

No. 19,074

ROBREE C. EARLE,
Appellant

v.

UNITED STATES OF AMERICA,
Appellee

REPLY BRIEF FOR APPELLANT EARLE

For Appellant Earle, there are basically four issues, namely that:

1. The .38 caliber murder weapon should have been excluded;

2. The juvenile Clay should not, on this record, have been permitted to testify;

3. The jury was erroneously told that it must either acquit both Earle and Long on the ground of insanity or acquit neither; and

4. The jury was erroneously told that, even though Earle did not testify, Earle's prior convictions could be considered to impeach his insanity defense.

Issue No. 4 *

The Government, acknowledging that Earle did not take the stand, confesses the error below but considers the following offensive portion of the charge merely "inappropriate" and "superfluous":

> ". . . the fact of his [Earle's] having been convicted may be given in evidence for whatever effect it has upon his credibility as a witness in the current trial.
>
> "In other words, members of the Jury, the fact that it has been established by the evidence that these defendants have been previously convicted of a crime or crimes is merely to be considered by you as to the effect such convictions may have upon their credibility insofar as it relates to their defense or defenses."
>
> Tr. 1656

The Government further urges this Court to be clairvoyant in a murder case and to deem "harmless" an error which seriously degrades appellant Earle's main defense.

Even though Earle did not testify, the trial court nonetheless told the jury that, because Earle had a prior criminal record, the jury was free to discount Earle's insanity defense. Contrary to the evidence, the court below demeaned Earle's credibility and the credibility of Earle's prime defense. So to impugn Earle's primary defense before the jury cannot, in a first degree murder case, be fairly or properly deemed "harmless". The fact is that this plain error affected a substantial right of Earle's--Earle's right to have his principal defense fairly considered by the jury.

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* Of course, the fact that Earle's trial counsel did not object to this portion of the charge does not insulate the trial court's errors from review here. See Stewart v. United States, 94 U.S. App. D.C. 293, 214 F.2d 879, 882, n.7 (1954); Tatum v. United States, 88 U.S. App. D.C. 386, 190 F. 2d 612, 614-615

Issue No. 3 **

The Government misses the point of Appellant's argument that it was error for the trial court to have suggested to the jury that Earle and his co-defendant Long had presented a single insanity defense, rather than two distinct defenses. The fact that Earle's and Long's defenses were qualitatively quite different merely dramatizes the trial court's error; had the defenses been similar the error would nevertheless persist.

The error below was in charging that there was somehow but a single composite Earle-Long state of mind to be determined by the jury. If, according to the charge, the jury found that that single Earle-Long mental condition met the tests of insanity, the jury was to return an insanity acquital as to both Earle and Long; if the jury found otherwise as to the composite Earle-Long mental condition, a guilty verdict should be entered as to both.

That the court below erred repeatedly is apparent upon a re-reading of the insanity charge at Tr. 1661-1675. The error cannot be deemed cured, as the Government meekly urges, by "from time to time" allusions in the charge to the fact that the jury had a duty to return separate verdicts.

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*(cont'd) (1951); "It has always been the custom of this court . . . 'in cases of serious criminal offenses, to check carefully the record for error prejudicial to defendant which he did not urge.'" Id, at 614, quoting in part Williams v. United States, 76 U.S. App. D.C. 299, 131 F.2d 21, 22 (1942). See also cases cited in Tatum, supra, 190 F.2d at 614, n. 3.

** See fn. *, p. 2.

Issue No. 2

Little need be added to Appellant's opening brief, save to urge this Court to examine Clay's testimony [Tr. 49-84, 92-95, 158-197, 211-216, 228-240, 244-289] in order to determine whether--in the light of Clay's age, the conflicting advice of his two counsel, the prosecutor's acknowledged threats, Clay's six months in solitary confinement by the juvenile authorities prior to trial, the prosecution's use of Clay's illicitly obtained statement as a crowbar to force his admissions, and Clay's lack of understanding of the privilege against self-incrimination--receipt of Clay's testimony, without further investigation by the trial court and without any cautionary instruction, comports with this Court's high standards for the administration of justice in Federal courts.

Issue No. 1

Lest there be confusion, let us restate the issue: Was the .38 caliber weapon come upon by the police as a result of "deliberately exploitative conduct by the police"? Copeland v. United States, 120 U.S. App. D.C. ____, 343 F. 2d 287, at 290 (1964). Was the weapon the illicit fruit of a tainted tree?

That the pistol was the fruit is not disputed. And no issue of attenuation has been or can be raised on this record; the secret interrogation of the uncounselled juvenile Clay led directly to the .38 caliber pistol introduced at Earle's trial. As stressed in our opening brief [Br. 24-30], the homicide detectives went to the Second Precinct "in particular looking for Clay" [MS-142] at about 3:18 A.M. on September 1, 1963 [MS-110]. Clay was then isolated by the detectives and driven--not to the D.C. Jail or to the Receiving Home--

but to the Homicide Squad Room [MS-112]. And for more than two and a half hours the juvenile Clay was there interrogated and isolated, uncounselled, until he disclosed the whereabouts of the .38 weapon [MS-113]. If this was not the "deliberately exploitative conduct" condemned by virtually every member of this Court in the past eight years, then it is hard to conceive how such conduct could exist. It does not appear that the Government seriously contends otherwise.

What the Government blandly suggests is that there are absolutely no restraints which can be judicially imposed upon police questioning or beatings or coercion of a juvenile, simply because it has been held that Rule 5(a) and Mallory do not apply to juveniles. See Harling v. United States, 111 U.S. App. D.C. 174, 295 F. 2d 161 (1961); Edwards v. United States, 117 U.S. App. D.C. 383, 330 F.2d 849 (1964). Not only does such a position torture those holdings, it distorts the purposes of the Juvenile Court Act beyond recognition.

Far from giving carte blanche to police inquisitions of juveniles, Harling and Edwards held that, although some questioning of juveniles may be permissible under some circumstances, evidence gained from such questioning must be excluded in District Court adult criminal proceedings.

Judge Washington's unanimous opinion in Edwards, clarifying Harling, is most instructive. The opinion recognizes clearly that even "fruit of an untainted tree may become poisonous when improperly used. The issue whether particular evidence should be excluded at an adult trial because it was directly or indirectly obtained through juvenile procedures may often be comparable to the issues which arise under the Mallory or Fourth Amendment exclusionary rules." 330 F.2d at 851. Thus, neither Edwards nor Harling lends any support to the

Government's idee fixe that information extracted from a juvenile through police misconduct may be freely admitted at trial.

We cannot assume that--as the Government contends--the lengthy isolation and early morning questioning of Clay constituted a proper detention "in custody by the juvenile authorities." Id. at 850. Nor can we assume further that the juvenile Clay's nocturnal sojourn at the Homicide Squad "establish[ed] a non-punitive, non-criminal atmosphere" in accordance with the intent of the Juvenile Court Act, ibid,, and constituted "preservation of the integrity of the juvenile system, lest it become a mere adjunct to the regular criminal processes." Id, at 851. In fact, not only are such assumptions unsupported in the transcript; they are directly contradicted by the testimony on the motion to suppress [MS-passim],by the trial disclosures concerning the handling of Clay subsequent to his Juvenile Court commitment, and by the examination of Clay himself at trial.

For this Court to accept the Government's assumption puts a premium on police violation of Rule 5(a) and would indeed provide an incentive for continued police misconduct. Adoption of the Government's assumptions would engraft a malignant tumor onto the otherwise healthy policies of the Juvenile Court Act, policies which this Court has carefully protected and nurtured.

Last, the Government resorts to the suggestion that Earle has no standing to challenge introduction of the murder weapon he allegedly fired. A careful reading of Wong Sun v. United States, 371 U.S. 471 (1963), shows that Earle does have the requisite standing. Recall that in Wong Sun the narcotics [.38 pistol] held inadmissible by the Supreme Court against petitioner Toy, id. at 488,

had been seized from Yee [Clay] who was not a defendant. As to petitioner Wong Sun [Earle], however, the Court found the narcotics [.38] admissible only because there had been no "official impropriety connected with their surrender by Yee [Clay]." Id, at 492. The Supreme Court stated:

> "The exclusion of the narcotics as to Toy was required solely by their tainted relationship to information unlawfully obtained from Toy, and not by any official impropriety connected with their surrender by Yee." Ibid. Emphasis added.

In Earle's case "official impropriety" abounds and has been rehearsed at length in Earle's briefs. Had the narcotics agents in Wong Sun beaten Yee [Clay] senseless in order to locate the narcotics [.38] --or illegally searched Yee's [Clay's] home or otherwise engaged in clearly improper conduct--it is difficult to believe that the Supreme Court would have acquiesced in the Government's argument and thus cavalierly sanctioned such "official impropriety" in derogation of the beneficient policies enforced by the exclusionary rules.

CONCLUSION

It is respectfully urged that Earle's conviction must be reversed and his case remanded to the District Court with instructions to grant a new trial.

Respectfully submitted,

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December 7, 1965

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

ROBREE C. EARLE,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

No. 19,074

PETITION FOR REHEARING EN BANC

Petitioner Earle's first degree murder and robbery convictions were affirmed by a division of this Court on April 15, 1966. Earle v. United States, No. 19,074. In so affirming, the panel decided several novel issues of paramount public concern. For reasons set forth herein and in his prior briefs, petitioner respectfully submits that those questions, crucial to the appeal, were decided erroneously and in a manner likely to create serious problems for the proper administration of criminal justice in the District of Columbia.[1] Accordingly, petitioner requests this Court to rehear the instant appeal en banc.[2]

1/ Moreover, at least one of the sitting division's conclusions may rest upon a critical factual inaccuracy, see pp. 3-4, herein.

2/ The facts are set forth in Earle's opening brief, at pp. 1-20.

I. EVIDENCE OBTAINED THROUGH UNLAWFUL INTERROGATION OF A JUVENILE, WHILE UNDER EXCLUSIVE JURISDICTION OF THE JUVENILE COURT, MUST BE EXCLUDED.

Over timely objection the Government introduced at trial a .38 caliber pistol which was identified by the prosecution's star witness, the juvenile Kenneth Clay,[3/] as the murder weapon used by petitioner. This key piece of evidence became available to the prosecution only because of information extracted unlawfully from Clay at the conclusion of a prolonged and uncounselled early morning police interrogation.[4/] [MS-113; 146]

The sitting division rejected petitioner's contention that the gun must be excluded, asserting that: (A) the juvenile Clay's "statement to the police was made immediately after his arrest on the homicide charge and before any delay occurred." Slip Op., p. 5 (emphasis added); (B) because "there is no requirement that a juvenile be taken to a magistrate after arrest," evidence elicited from such a juvenile is admissible even if obtained as a result of prolonged and unlawful police interrogation, ibid.; and (C) in any event petitioner is precluded from complaining of the gun's admission because "no right of [petitioner's] was violated." Ibid. Petitioner submits that this holding is based upon a misreading both of the facts and the applicable law.

3/ The prosecutor acknowledged: "Your Honor, may I point out that my entire case or 95 per cent of my case rests on what [Clay] will say." [Tr.6]

4/ The trial transcript is cited herein [Tr.__]; the motion to suppress hearing transcript, Volumes A&B, is cited herein [MS__].

A. The "Threshold" Confession

The panel assumed arguendo that Mallory applied to the juvenile Clay and asserted as a fact that Clay's "statement . . . was made immediately after his arrest on the homicide charge." Slip Op., p. 5 (emphasis added). And indeed the record is clear that Clay did make an oral statement implicating himself and petitioner after Clay was taken by Homicide Squad officers from the precinct where he was being held on a motor vehicle charge. [MS-112-113] However, Clay's oral statement did not divulge the location of the gun, ibid. Neither was that oral confession, nor the written statement subsequently extracted by the police, ever even offered at trial by the prosecution. [MS-12, but see Tr.228-240]

Only at 5:45 A.M., almost three hours following Clay's arrest and after his oral statement finally had been typed, did Clay reveal the gun's location. [MS-113]

On the facts above, this cannot properly be deemed the result of a so-called "threshold" confession within the exception to Mallory[5/] apparently carved out in Muschette v. United States, 116 U.S. App. D.C. 239, 322 U.S. F2d 989 (1963), rev'd on other grounds, 378 U.S. 569 (1964). Unlike Muschette where the challenged evidence consisted of a confession rendered within 25 minutes of arrest, Clay's damaging revelation of the location of the murder weapon was elicited more that 2-1/2 hours after Clay's arrest, following extensive uncounselled questioning by Homicide Squad officers, and after Clay's "threshold" confes-

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5/ Mallory v. United States, 354 U.S. 449 (1957)

sion had been typed.

As a matter of law, any response to police questioning--or evidence derived therefrom--made by a juvenile while within the protective custody of the Juvenile Court is inadmissible in subsequent criminal proceedings against such juvenile. Harling v. United States, 111 U.S. App. D.C. 174, 295 F.2d 161, 162-3 (en banc, 1961); Edwards v. United States, 117 U.S. App. D.C. 383, 330 F.2d 849 (1964); Harrison v. United States, __U.S. App. D.C.__, __F.2d__(No. 17991, en banc, Dec. 7, 1965).

The .38 caliber revolver clearly could not have been admitted into evidence against Clay in any criminal proceeding. For reasons set forth in (C) below, suppression of the weapon as evidence against petitioner is similarly required.

B. Applicable Juvenile Procedures

The panel next found Mallory inapplicable because "there is no requirement that a juvenile be taken to a magistrate after arrest." Slip Op., p. 5, and evidently derived from this proposition the conclusion that the gun was otherwise admissible. As noted above, the exclusionary rule rejecting evidence extracted from a juvenile while under the exclusive Juvenile Court jurisdiction (as was Clay) is far more restrictive than its Mallory counterpart for adults. That Mallory is not applicable can be of little comfort, since the Government is precluded by Harling and Harrison from introducing any evidence obtained from Clay. The instant decision, if allowed to stand, would imply the existence of some lesser standard for evidence obtained from juveniles; it would augur ill for the future of that previously clear policy.

Suppression of the gun is required not only to secure the beneficent purposes of the Juvenile Court Act, it is necessary as well in order to insure compliance with the statutory juvenile arrest procedures, specifically, D.C. Code §16-2306(a) (Supp. V, 1966). See Kent v. United States, __U.S.__ notes 1-2 (34 U.S.L. Week 4228, March 21, 1966), rev'g 119 U.S. App. D.C. 378, 343 F.2d 247 (1965).

It is clear that the police flagrantly disregarded the District Code's command for "immediate" transfer of Clay into the custody of juvenile authorities. D.C. Code §16-2306(a) (Supp. V, 1966). For the compelling reasons articulated by the Supreme Court in Mallory, see also Mapp v. Ohio, 367 U.S. 643 (1961), and frequently reiterated by this Court both in Mallory and Harling-type cases, exclusion of the Government's ill-gotten gains is indispensable to preserving the integrity of District law and the dignity of this Court.

C. Right to Contest the Admissibility of the Gun

Finally, the division concluded that, even if suppression of the weapon were otherwise required, petitioner is not entitled to raise this issue because "no right of [his] was violated." Slip Op., p. 5. In so holding, the panel decided without further discussion a matter of high public policy, as well as one of first impression in the District. Petitioner submits that the panel's resolution of this question--critical to the outcome of the appeal--was erroneous.

The Court's reliance upon Wong Sun v. United States, 371 U.S. 471 (1963) is misplaced. As is explained in petitioner's Reply Brief, pp. 6-7:

> "Last, the Government resorts to the suggestion that Earle has no standing to challenge introduction of the murder weapon he allegedly fired. A careful reading of

Wong Sun v. United States, 371 U.S. 471 (1963), shows that Earle does have the requisite standing. recall that in Wong Sun the narcotics [.38 pistol] held inadmissible by the Supreme Court against petitioner Toy, id. at 488, had been seized from Yee [Clay] who was not a defendant. As to petitioner Wong Sun [Earle], however, the Court found the narcotics [.38] admissible only because there had been no 'official impropriety connected with their surrender by Yee [Clay].' Id. at 492. The Supreme Court stated:

> 'The exclusion of the narcotics as to Toy was required solely by their tainted relationship to information unlawfully obtained from Toy, and not by any official impropriety connected with their surrender by Yee.' Ibid. Emphasis added.

"In Earle's case 'official impropriety' abounds and has been rehearsed at length in Earle's briefs. Had the narcotics agents in Wong Sun beaten Yee [Clay] senseless in order to locate the narcotics [.38] -- or illegally searched Yee's [Clay's] home or otherwise engaged in clearly improper conduct-- it is difficult to believe that the Supreme Court would have acquiesced in the Government's argument and thus cavalierly sanctioned such 'official impropriety' in derogation of the beneficent policies enforced by the exclusionary rules."

The only other case cited by the Court is wholly inapposite. In People v. Portelli, 15 N.Y. 2d 235, 257 N.Y.S. 2d 931, 205 N.E. 2d 857 (1965), cert. denied, 382 U.S. 1009 (1966), the New York Court of Appeals held only that the testimony of a witness would not be stricken because coerced "if the fact of such earlier coercion or other official lawlessness is disclosed to the jurors." The New York Court of Appeals did not even discuss (let alone reject) the defendant's right to raise the question of coercion of a witness. Manifestly, by

reaching and deciding the issue on the merits, that court assumed the existence of the defendant's standing to present this question.

The panel's standing rule, if not reversed, is demonstrably inconsistent with and subversive of the efficacy of the special scheme established for the arrest and detention of juveniles in the District of Columbia.

This holding establishes a substantial incentive for the police, in violation D.C. Code §16-2306(a) (Supp. V, 1966), to delay transfer to the juvenile authorities in order unlawfully to extract evidence from juveniles for use against adult principals. Merely, by refraining from seeking or acting upon a waiver of jurisdiction, the prosecution thereby could reap the benefits of police lawlessness, [6/] substantially circumventing the exclusionary rules so carefully nurtured by this Court.

Introduction in subsequent criminal proceedings of evidence obtained from juveniles while within the exclusive jurisdiction of the Juvenile Court contradicts the non-criminal, non-punitive relationship between the Government and the juvenile envisioned by the Juvenile Court Act. To uphold "principles of 'fundamental fairness' to the juvenile, and preservation of the integrity of the juvenile system, lest it become a mere adjunct to the regular criminal processes," this Court has refused to sanction the admission of evidence elicited during the period of Juvenile Court jurisdiction in a subsequent prosecution against the

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6/ The Supreme Court has reluctantly concluded that the only effective way to deter police lawlessness is by excluding illegally obtained evidence. Compare, Wolf v. Colorado, 338 U.S. 25 (1949), with Mapp v. Ohio, supra. See also Mallory v. United States, supra; Hogan & Snee, The McNabb-Mallory Rule: Its Rise, Rationale and Reason, 57 Geo. L.J. 1 (1958).

juvenile. Edwards v. United States, supra, 380 F.2d at 851. Use of evidence so obtained for the purposes authorized by the panel's decision impinges no less directly upon those "fundamental principles" and "the integrity of the juvenile system."

In this case, the overriding public interest in enforcement of the juvenile system can be asserted only by petitioner. Since the interests served by the exclusionary rule are public, no less than personal, in character, there is no reason to limit to the juvenile the opportunity to vindicate the law. Petitioner respectfully submits that the panel's holding is potentially destructive of the entire juvenile system and, accordingly, should be rejected.

II. CLAY'S FIFTH AMENDMENT WAIVER WAS IMPROPER

On appeal the Court was urged to scrutinize the record to determine whether Clay's Fifth Amendment waiver was properly received by the court below:

> ". . . in the light of Clay's age, the conflicting advice of his two counsel, the prosecutor's acknowledged threats, Clay's six months in solitary confinement by the juvenile authorities prior to trial, the prosecution's use of Clay's illicitly obtained statement as a crowbar to force his admissions, and Clay's lack of understanding of the privilege against self-incrimination . . . ." Reply Brief, p. 4

Despite these facts, the sitting division found Clay's Fifth Amendment rights "fully protected," Slip Op. p. 8, and went on to deny petitioner the right to question the propriety of the waiver.

Had Clay been the defendant at trial it is clear that this Court would have found invalid his waiver of the privilege against self-incrimination. In the course of two days of intermittent attempts by the prosecution to secure the waiver from Clay, the trial court variously sustained an attempted assertion by Clay of the

privilege [Tr. 216] and acknowledged that Clay did not understand the privilege [Tr. 196]. But, after Clay's counsel announced on the third morning of trial that Clay would testify, the court below rejected defense counsel's plea that the court itself examine Clay to determine the voluntariness of Clay's waiver and Clay's understanding of his right to remain silent. [Tr. 250-251; 253-254].[7/]

Although there appears to be some authority to support a holding that the validity of an adult witness's Fifth Amendment waiver may not be attacked by the defendant, there appears to be no authority immunizing a juvenile witness's patently defective waiver from appellate scrutiny.

In this jurisdiction such a major step -- and its virtually inevitable erosion of the juvenile's special testimonial status -- should be taken only upon full consideration by the Court en banc.

* * * * *

Should rehearing be granted, petitioner reasserts the two errors in the charge to the jury as set forth in his Brief at pp. 37-40, and in his Reply Brief at pp. 2-3.

7/ Such "direct communication is desirable," this Court declared in Hatcher v. United States, __U.S. App. D.C. __, 352 F.2d 364, 365 (1965).

CONCLUSION

The panel's novel interpretations of the applicable law and the broad consequences of its decision make this a proper case for rehearing en banc.

Respectfully submitted,

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CERTIFICATE OF GOOD FAITH

I hereby certify that this petition is presented in good faith and not for delay.

_____
Daniel M. Singer

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Petition For Rehearing En Banc were this 2d day of May, 1966, mailed, postage prepaid, to Frank Q. Nebeker, Esq., Assistant United States Attorney, United States Court House, Washington, D.C., attorney for Appellee, and to James R. Treese, Esq., 1701 K Street, N.W., Washington, D.C., attorney for appellant Long, and to George W. Mitchell, Esq., 2000 9th Street, N.W., Washington, D. C., attorney for appellant William E. Huff.

_____
Daniel M. Singer

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

~~19,0~~ 6 1 6

WILLIAM E. HUFF,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

GEORGE W. MITCHELL
Attorney for Appellant
PAUL E. MILLER
Associate Counsel

QUESTIONS PRESENTED

I

Whether the Court in its instruction relative to the driving of the automobile by appellant Huff on August 25, 1963 usurped the function of the jury?

II

Whether the trial Court should have granted appellant's motion for judgement of acquittal at the conclusion of Government's case-in-chief?

INDEX

TABLE OF CASES

AUTHORITY

39 Am. Jur. Sec. 136, P. 144.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,075

WILLIAM E. HUFF,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of conviction in the Court below. Appellant William E. Huff was tried on a three count indictment, the jury having found appellant not guilty as to count one of the indictment, the appellant was convicted on count two of the indictment, said count charging Murder in the First Degree--Killing while perpetrating and attempting to perpetrate the crime of Robbery and count three charging Robbery, violations of Sections 2401 and 2901, Title 22 of the District of

Columbia Code of Laws, 1961 Edition. Appellant was sentenced to a term of life imprisonment on the Murder count of the indictment and a term of three to nine years to run concurrently on the Robbery count of the indictment. Appellant was granted leave to proceed on appeal without prepayment of cost and his appeal was duly noted. This being a final order of the United States District Court for the District of Columbia, jurisdiction is vested in this Court.

STATEMENT OF CASE

On October 14, 1963, the appellant William E. Huff was indicted in a three count indictment charging him along with James C. Long and Robree C. Earl with the crimes of Murder in the First Degree--Killing while perpetrating and attempting the crime of Robbery, Murder in the First Degree and Robbery, in violation of Title 22, Sections 2401 and 2901 of the District of Columbia Code of Laws, 1961 Edition. This indictment charged that appellant William E. Huff, together with James C. Long and Robree C. Earle

> "on or about August 25, 1963, when in the District of Columbia...did kill Newell W. Ellison, Jr., while perpetrating and attempting to perpetrate the crime of Robbery, which is set forth in the third count of this indictment."

The third count charges as follows:

> "On or about August 25, 1963, within the District of Columbia, James C. Long, Robree C. Earle and William E. Huff, by force and violence and against resistance and by sudden and stealthy seizure and snatching and by putting in fear, stole and took from the person and from the immediate actual possession of Newell W. Ellison, Jr. property of Newell W. Ellison, Jr., of the value of about $31.00 consisting of one wallet of the value of $1.00 and $30.00 in money."

Following a four-week jury trial, appellant was convicted of Murder in the First Degree--Killing while perpetrating the crime of Robbery and Robbery. The appellants were found not guilty of the first count of the indictment charging them with First Degree Murder. The appellant was sentenced to term of life imprisonment on the Murder Count of the indictment and a term of three to nine years, to run concurrently, on the Robbery count of the indictment (original record).

F A C T S

The Government's case as to appellant William E. Huff, was predicated on the theory of aiding and abetting, based upon the testimony of the following witness, who testified in substance as follows:

A juvenile witness named Kenneth Jerome Clay, testified for the Government that he, on the night in question, August 25, 1963, while walking north on Fourteenth Street in the city of Washington, District of Columbia, observed one James C. Long operating an automobile; that accompanying James C. Long was Robree C. Earle, and a juvenile named Robert Robertson; that Robertson called him to the automobile; that he was asked did he want to go for a ride; that he indicated hee

wished to do so and got into the car; that they then drove around for about an hour before picking up appellant William E. Huff (Tr. 259-266 inclusive). The record indicates by stipulation (Tr. 259-266 inclusive) that the appellant William E. Huff entered the automobile under the same circumstances as did the witness Kenneth Clay, that is to say, that while walking somewhere on Georgia Avenue, in the City of Washington, District of Columbia, Huff was called to the automobile and asked if he wanted to go for a ride. The witness, Kenneth Clay, further testified that when the appellant, Huff, got into the automobile, he began to drive; that they, "drove around, going on different streets"; that during this time there was no conversation relative to a Robbery; that somewhere on the parkway, (not indicating what parkway) the automobile had mechanical failure, after which the automobile was started again and "somewhere on Kalorama Road the automobile stopped once more." The record is not clear as to whether the automobile stopped because of mechanical failure on Kalorama Road, however, the witness Clay does testify that on Kalolama Road, three persons got out of the automobile, to wit: James C. Long, Robree C. Earle and Robert Robertson.

Clay testified that he did not observe Robree C. Earle's hand as he left the automobile, however, he does testify that he observed Government's Exhibit No. 1, i.e., a pistol, in the hands of James C. Long as he left the automobile. Moreover, the record would indicate that just as Appellant Long was leaving the automobile he said, "Don't shoot", and the appellant Earle said, "okay." Our appellant, William E. Huff, and juvenile witness Clay were left in the automobile.

The witness Kenneth Clay continues to testify by indicating that after the appellant Long approached Mr. Newell Ellison, he said "this is a hold-up," that there was a struggle and Long's gun went off, that there was within a few seconds another shot; that Long and Earle then came back to the car; that Long then went back to Mr. Ellison and got his money from his pocket and got into the automobile after which Earle and Robertson got back into the automobile. The witness Clay testified that after all patties got back into the automobile the defendant Huff said nothing, that the appellants Long and Earle and the Juvenile Robertson then began to argue. The witness Clay testified that if Huff said anything he didn't remember; that they then drove off.

At the next point in the testimony we find the witness Clay testifying that the appellant Long indicated that thirty dollars had been found in the billfolder taken from the body of Newell W. Ellison and that this money was divided. However, the witness Clay does not indicate between whom it was divided. He testifies that he does not know "how much" Huff got. The witness Clay has previously testified out of the presents of the jury that he did not know if Huff got any of the money at all. (Tr.) While in the presence of the jury on cross-examination the witness Clay testified, "I don't know if he got anything." (Tr. 307)

After the Government had introduced some other corroborating witnesses as to the evidence that had been given by the witness Clay, the Government rested its case, a motion for judgment of acquittal was made on behalf of Appellant, William E. Huff, which was denied by trial Court. The appellant William E. Huff did not put on any evidence in his own behalf, other than the stipulation entered by Government Counsel and Counsel for the Appellant, Huff, indicating that the appellant Huff had entered the automobile under the same or similar circumstances as did the witness Kenneth Clay.

At the close of the entire case counsel summed up their cases to the jury; the Court charged the jury over counsel for appellant William E. Huff's objections (Tr. 1455 thru 1457 inclusive) as follows:

> You will recall several weeks ago that you heard the testimony of a witness named Clay, a minor or juvenile. I am required by law to state to you that insofar as his relationship between himself and these defendants is concerned, the witness Clay is an accomplice of the present defendants. I am required by law to state to you that the testimony of an accomplice should be received with care and should be scrutinized with caution. The degree of credibility which should be given to such testimony is a matter exclusively within the province of the jury and you may, if you desire, accept the testimony of an accomplice. In fact, the jury has the right to convict a person on the sole, uncorroborated testimony of the accomplice if the jury believes the accomplice. An accomplice in the commission of a crime is a competent witness. An accomplice is anyone who knowingly and voluntarily cooperates with, aids or assists, or advises or encourages another in the commission of a crime regardless of his degree of participation. No matter how small the degree may be, a person who aids another in the commission of a crime is an accomplice. . . .
>
> If you find the defendant Huff, while driving an automobile on August 25, 1963, in the company of one or more of the defendants, knew that a robbery was about to be committed, and a robbery thereafter was committed, and if the defendant Huff witnesses the commission of a robbery or learned that a robbery had been committed in the 2300 block of Kalorama Road, Northwest, and thereafter aided or assisted the principal offenders in leaving the scene of that offense by willingly and knowingly continuing to drive that automobile, you may find the defendant Huff as an aider and abettor in the crime, as I have previously defined that term to you.

If you find that the defendant Huff drove an automobile to and from the 2300 block of Kalorama Road, Northwest, on August 23, 1963, in the company of one or more of the defendants, and that while there, in his presence and to his knowledge, one or more of the defendants by force and violence took a sum of money from the person or body of Newell W. Ellison, Jr., and if you further find that the defendant Huff received any portion of the money taken from the person or from the body of Newell W. Ellison, Jr., you may find the defendant Huff is an aider and abettor of the crime of robbery, as I have previously defined that term to you.

STATUTE AND RULES INVOLVED

Title 22, D. C. Code, Sec. 2401, provides in pertinent part:

> Whoever, being of sound memory and discretion, kills another purposely, either of deliberate and premeditated malice or by means of poison, or in perpetrating or attempting to perpetrate any offense punishable by imprisonment in the penitentiary, or without purpose so to do kills another in perpetrating or in attempting to perpetrate any robbery, or kidnapping, or in perpetrating or attempting to perpetrate any housebreaking while armed with or using a dangerous weapon, is guilty of murder in the first degree ----.

Title 22, D. C. Code, Sec. 2901, provides in pertinent part:

> Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery----.

Title 18, U. S. C. Rule 29 (a) provides:

> Motion for Judgment of Acquittal. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The Court on motion of a defense or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment of information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the Government is not granted, the defendant may offer evidence without having reserved the right.

Federal Rules of Criminal Procedure, Rule 52 (b)

> United States Constitution, Sixth Amendment. In all Criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by and impartial jury----.

STATEMENT OF POINTS

POINT I

Where the Court hypothesized an instruction to the jury in language characterizing acts or conduct that may have been done by the appellant without an apparent motive or intent though related by time and circumstances to the doing of definite criminal acts by other persons, as being such to make appellant an aider and abettor, the Court has an afirmative duty to further hypothesize an instruction in language the converse of which would indicate the appellant to have been without any criminal motive or intent for doing these said acts.

With respect to Point I, appellant desires the Court to read the following pages of the reporter's transcript: (Tr. 1656-1658 inclusive).

POINT II

The evidence adduced at the District Court trial was insufficient to support a Guilty verdict and was not supported by substantial evidence.

With respect to Point II, appellant desires the Court to read the following pages of the reporter's transcript: Tr. 258-312 inclusive.

SUMMARY OF ARGUMENT

POINT I

The Court below usurped the function of the jury in its instruction relative to the driving of the automobile on August 25, 1963, in that the instruction takes away from the jury the factual determination as to whether the driving of said automobile was in fact aiding and abetting. The instruction precluded the triers of fact from supplying a motive or intention inferentially other that a criminal one. The triers of fact have the ultimate and unqualified right to determine all issues of fact including what conduct or acts constitute aiding and abetting or when infact the person is an aider and abettor.

POINT II

The Government in the case at bar had the burden of proving that the defendant, William E. Huff, aided and abetted the other defendants to commit the alleged crime beyond a reasonable doubt. The showing by the Government that the defendant drove an automobile to and from the scene of the murder and/or robbery is insufficient to support a verdict of guilty in the absence of a showing by the Government of preconcert or conspiracy.

A R G U M E N T

POINT I

THE COURT BELOW USURPED THE FUNCTION OF THE JURY IN ITS INSTRUCTION RELATIVE TO THE DRIVING OF THE AUTOMOBILE ON AUGUST 25, 1963. IN THAT THE INSTRUCTION TAKES AWAY FROM THE JURY THE FACTUAL DETERMINATION AS TO WHETHER THE DRIVING OF SAID AUTOMOBILE WAS IN FACT AIDING AND ABETTING. THE INSTRUCTION PRECLUDED THE TRIERS OF FACT FROM SUPPLYING A MOTIVE OR INTENT INFERENTIALLY, OTHER THAN A CRIMINAL ONE. THE TRIERS OF FACT HAVE THE ULTIMATE AND UNQUALIFIED RIGHT TO DETERMINE ALL ISSUES OF FACT INCLUDING WHAT CONDUCT OR ACTS CONSTITUTE AIDING AND ABETTING OR WHEN INFACT THE PERSON IS AN AIDER AND ABETTER.

> (With respect to Point 1, Appellant desires the Court to read the following pages of the Reporter's Transcript. TR 258-306, inclusive and 1654-1658 inclusive)

The instruction in the Court below with respect to the driving of the automobile on August 25, 1963, was erroneous in at least two particulars. In the first instance, the instruction takes one affirmative act of the appellant Huff, that is the driving of the automobile to and from the scene of the crime, and does not allow the jury to make a choice as to whether this was an innocent act. The instruction concludes that if appellant:

> "thereafter aided and assisted the principal offenders in leaving the scene of the offense by willingly and knowingly continuing to drive the automobile, you may find the defendant Huff as an aider and abettor to the crime".

This language leaves the jury without choice as to the nature of the act of driving the automobile. The appellant contends that the jury was not allowed to make a favorable inference on the evidence based upon this instruction. The act or words of encouragement and abetting must have been used by the accused with the intention of encouraging and abetting the principal offenders. Hick v. United States, (1893) 150 U. S. 442, 37 L. Ed. 1137-14 Sup. Ct.

Secondly, the instruction seriously trenched on that untrammelled determination of the facts by a jury to which parties accused of the commission of a crime are entitled. The instruction usurpted the function of the jury because in effect it tells the jury that if they find that appellant intentionally drove the automobile after "witnessing or learning that a robbery had been committed...." you may find appellant an aider and abettor. The fundamental rule is that no encouragment by the Court upon the province of the jury which is to determine the facts of the case can be tolorated. Allison v. United States 160 U.S. 203 (1895) In the case at bar whether the driving of the automobile was an act which aided and abetted the principal offenders was a fact for the jury's determination. A Court may not tell the jury that any legal result follows from evidence which only

tends to prove the issue to be tried, since the effect is to withdraw from the jury the right to determine matters of fact. Providence v. Babcoch (Gardner v. Babcock) 3 Wall Cus) 240, 18 L. Ed. 31.

POINT II

THE EVIDENCE ADDUCED AT THE DISTRICT COURT TRIAL WAS INSUFFICIENT TO SUPPORT A GUILTY VERDICT AND WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

(With respect to Point II, appellant desires the Court to read the following pages of the reporter's transcript: Tr. 258-312, inclusive.)

The Court below should have granted appellant's William E. Huff's motion for judgment of acquittal at the close of the Government's case. As we know at this point a question of law is raised as to whether, when all the evidence is considered together with all reasonable inferences therefrom, in an aspect more favorable to the Government's case there is a total failure of lack of evidence to prove any necessary element of the Government's case.

The rule therefore, is that trial judge in passing upon a motion for directed verdict of acquittal must determine whether upon the evidence giving full play to the right of the jury to determine creditability, weight of the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt if there be no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt, the motion must be granted. Curley vs. United States, 81 US App. D.C. 389, 392, 160 F 2d 229 (1947).

The Government in the case at bar had the burden of proving that the defendant, William E. Huff, aided and abetted the other defendants to commit the alleged crime beyond a reasonable doubt. Since there is no controversy as to whether Huff was driving the automobile at the time of the alleged robbery, the factual question was presented as to whether driving of the said automobile was aiding and abetting the other defendants. A companion of a person is not an aider or abettor merely because he furnishes company to the person engaged in crime, U. S. vs. Gargwillo C. C. Addny, 310 F 2d 249, The Government's witness, Kenneth J. Clay testified that after appellant Huff got in the car, "we drove around"...Drove around, going to different streets" (Tr.259). Reasonable minds would not be able to conclude at this juncture of the testimony that the purpose of this driving was to find a victim and then rob him. Indeed, the witness Clay testified that there was no conversation relative to a robbery at any time. (Tr. 266) Lack of testimony in this regard leaves the hypothesis of intent to rob just as logical as that of "joy riding", a speculative conclusion not permissible in law because of the duty of the Government to prove it's case beyond a reasonable doubt.

Thus, at the close of the Government's case, the trial Court should have granted defendant Huff's motion for judgment of acquittal appropriately made at that time. (Tr.1436) See Cephus v. United States, U.S. App. D.C. 1324 F 2d 893 (1963). The doctrine and standard postulated in Curley v. United States, 81 U.S. App. D.C. 389, 160 F 2d 229 Cert. denied 331, U.S. 837 rehearing denied, 331 U.S. 869, 870 (1947) most assuredly apply here.

This Court said:

> "This true rule, therefore is that a trial judge in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inference of fact. A reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes that upon evidence there must be such a doubt in a reasonable mind, he must grant the motion; or to state it another way, if there is not evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt, the motion must be granted. If, he concludes that either of the two results, a reasonable doubt, is fairly possible, he must let the jury decide the matter.
>
> In a given case, particularly one of circumstantial evidence that determination may depend upon the difference between pure speculation and legitimate inference from proven facts. The task of the judge in such case is not easy, for the rule of reason is frequently difficult to apply, but we know no way to avoid that difficulty."

The Curley case clearly stands for the proposition that "unless there is evidence of some fact which to a reasonable

mind fairly excludes the hypothesis of innocence or if upon the whole of the evidence, a reasonable mind, is in blank as between guilt and innocence, a verdict of guilty cannot be sustained.

Aside from the above discussed argument relating to the insufficiency of the evidence to convict Huff, the argument in its totality becomes more meaningful when viewed in the light of the negative character of Clay's testimony. During the direct examination of Clay, he testified, in response to questions from Mr. Duncan, as follows (Tr. 283):

Q. What became of that money? What was done with it?

A. It was divided up.

Q. Tell the Court and the ladies and the gentlemen of the jury how much each person got. How much did you get?

A. Four and some change.

Q. How much did Huff get?

A. I don't know how much he got.

Further, on cross-examination by Mr. Mitchell, Clay testified as follows (Tr. 306-307):

Q. Now, Clay, did you say yesterday that you don't know whether Huff got any of the money at all?

A. Yes, I did, yes.

Q. And you in fact don't know whether he took any of that money, do you not?

A. I don't know if he got anything.

These narratives are the only portions of the trial relating to the possibility that Huff received any of the divided monies.

In this jurisdiction before an accused can be guilty under the felony-murder statute, the government must prove beyond a reasonable doubt all of the necessary elements of the charged felony and homicide. The alleged felony committed by Huff is robbery. Robbery, by definition, includes the taking and carrying away the personal property of another, either by stealth or by force and violence and, as here, where a person is charged as being an accomplice to the offense of robbery, there must also be some showing that he shared in the proceeds of the crime. And it is reversible error for the court below to instruct the jury that if the jury finds that appellant Huff shared in the proceeds of the robbery they may find him guilty, when there is either none or only a scintilla of evidence to support that proposition. Where is that evidence in this case? The government is speculating when it attempts to argue that the above-outlined narrative demonstrates that Huff either took or shared in the proceeds of the robbery. That is the trouble with the government's case. One can speculate that money

was taken or shared, but where is the evidence that he actually took any of the money? Where is the evidence from which a reasonable inference could be drawn as to whether any money was taken by Huff? Many reasonable hypotheses can be conjured up, as the government does, but it is not a reasonable hypothesis we are interested in, but evidence from which a reasonable inference may be drawn.

The testimony of Clay that he was present when the homicide and robbery occurred, but "I don't know if he got anything" (Tr. 306-307), is, in view of all circumstances of the case, merely negative testimony.

Negative evidence is defined as evidence tending to show that the witness was present when the event occurred, but he did not see or know of the happening or existence of a circumstance or fact, or that it appears he was paying no particular attention at the time,or was not in a position to observe. (Dixie Ohio Express Co. v. Poston, 170 F 2d 446 5 Cir 1948). As such, this kind of testimony by one in a position to hear or see a thing if it had occurred, who might, under all the circumstances, with the same degree of reason, have heard or seen it in that event, is not so strong or so satisfactory as that of one who says that he did hear or see it. (Le Cointe V.V.S. 7 App. D.C. 16)1895.

It is only a species of circumstantial evidence, and whether it is of sufficient probative force to raise or support an issue or sustain a finding of criminality culpability, depends largely on the circumstances of the case, and more particularily on the likelihood that the witness would have observed the fact had it occurred and on the question whether the witness was paying attention to what occurred, and was in a position, or had reasonable opportunity to observe. Wheat v. Baltimore & O. R. Co., 262 F. 2d 289 (7th Cir, 1959) Cert. denied 359 U. S. 1005 (1959); Gulf, M. & O.R. Co. v. Freund, 183 F. @ 2d 1005 (8th Cir., 1950) Cert. denied Freund v. Gulf, M. & O.R. Co., 340 U. S. 904 (1950) (Where, in a negligence a motorist who did not hear the crossing alarm, but had his attention directed to other matters or his hearing ability decreased by other noises and he testified he heard no alarm, and where there was independent positive testimony that the alarm was given, there was no issue of fact for the jury.)

It is a general rule that when there is a substantive conflict in the evidence the issue must be submitted to the jury. But where, as here, there is negative testimony which is unopposed by positive testimony, the Court is obligated

to direct or overturn a verdict, not by encroaching upon the exclusive function of the jury and weighing each class of testimony, one against the other, but by performing its own exclusive function of determining, as in all cases, the question as to whether the evidence introduced in proof of the issue is sufficient to support the verdict. Philadelphia, B. & W.R. Co. v. Catta, 85 ATL. 721 (Del. 1913); 39 Am. Jur. Sec 136, p. 144. This negative testimony of Clay is not considered by the Courts as substantive evidence, but its value amounts, at most, to nothing more than a mere scintilla. Baltimore & O.R. Co. v. Baldwin, 144 F. 53 (6th Cir., 1906). And, as stated in Baltimore & O.R. Co. v. Postum, 177 F. 2d 53, 85 U.S. App. D.C. 207 (1949), " a mere scintilla of evidence, or evidence raising only a conjecture, guess, speculation, surmise, or suspicion is insufficient to take the case to the jury, that. where the Court finds there is only a scintilla of evidence, it is its duty to withdraw the case from the jury. There must be substantial evidence on the part of the plaintiff in support of his claim in order to justify submission to the jury. Substantial evidence, being that evidence, necessary to support a verdict, is evidence of such quantity and weight as would be sufficient

to justify a reasonable man in drawing inferences of fact that is sought to be sustained. Baltimore v. Postum, supra.

Finally, there is the matter of Clay's credibility as a witness as having a lessening effect on the substantially of his testimony. The Court in its instructions when characterizing Clay as an accomplice to the crime, correctly stated the rule in this jurisdiction when it stated " I am required by law to state to you that the testimony of an accomplice should be received with care and should be scrutinized with caution." This rule in effect, is an admonition to the jury that an accomplice's testimony is not to be given, initially, the same credibility as an untainted witness' testimony. Therefore, the trial judge, in passing on defendant's Huff's motion for a directed verdict of acquittal under Rule 29 (a) of the Federal Rules of Criminal Procedure, 18 U.S.C., should have in weighing the evidence determined, on the evidence, giving full play to Clay's status as an accomplice, that a reasonable mind could not find guilt beyond a reasonable doubt, and should not have allowed the jury to Act, because to have done so was to allow the jury to speculate without evidence adequate in the law. See Cooper v. U. S., 94 U.S. App. D.C. 343, 218 F 2d 39 (19__).

CONCLUSION

In conclusion this Court, in view of the foregoing, should reverse the judgment below and cause a judgment to be entered therein for appellant.

GEORGE W. MITCHELL
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NOrth 7-7333

Binding Copy

United States Court of Appeals
District of Columbia Circuit

DISTRICT OF COLUMBIA COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FILED MAY 2 1966

Nathan J. Paulson
CLERK

WILLIAM E. HUFF, ET AL :

Appellant :

vs. : Criminal No. 19075

UNITED STATES OF AMERICA . :

Appellee :

PETITION FOR REHEARING EN BANC

The Appellant, William E. Huff, by and through his attorney of record, petition the Court to grant a re-hearing and further consideration hereof that the judgment entered herein on April 15, 1966, be reversed and entered in favor of petitioner, and for grounds of this petition states as follows:

That the Court failed to consider whether it was in error for the Court below to instruct the jury that "if they find that the Appellant Huff shared in the proceeds of the crime they may find him guilty as an aider and abetter," when there is no evidence to support a finding that the Appellant Huff shared in the proceeds. It is admitted that it is not necessary for a defendant to share in the proceeds of the crime in order to be found guilty as an aider and abetter, however, the Appellant urges that it is in error for the Court to

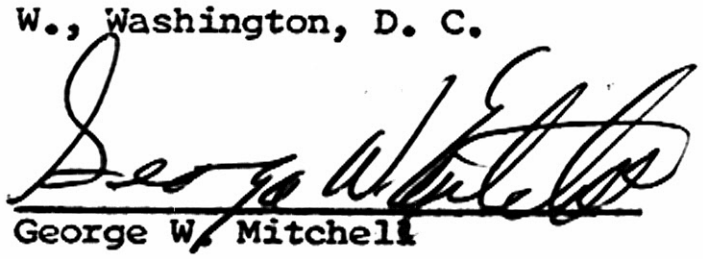
instruct the jury that they may find the Appellant an aider and abetter if in fact as the Government conceeds there is no showing that he shared in the proceeds of the crime.

Respectfully submitted,

Goerge W. Mitchell
Court Appointed Attorney for
Appellant William E. Huff
2000 Ninth Street, N. W.
Washington, D. C. 20001
NOrth 7-7333

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing petition for rehearing was served on this _____ day of April, 1966, upon the United States Attorney for the District of Columbia, United States Courthouse, 3rd & Constitution Avenue, N. W., Washington, D. C.



George W. Mitchell